Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Logistics Management Division, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 84-150)

Bonds

Approval and discontinuance of Carrier's Bonds, Customs Form 3587

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figues in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: July 13, 1984.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Air Cargo Transport—see: Laurie A. Barnes, Se.			
Laurie A. Barnes, Sr., d/b/a Air Cargo Transport, P.O. Box 3648, Federal Way, WA; motor carrier; The Aetna Casualty and Surety Co.	May 24, 1984	May 31, 1984	Seattle, WA $25,000
Builders Transportation Co., Inc., 3710 Tyulane, Memphis, TN; motor carrier; Fireman's Fund Ins. Co.	May 31, 1984	June 7, 1984	New Orleans, LA $50,000
Cenac Towing Co., Inc., P.O. Box 2617, Houma, LA; water carrier; Fidelity & Deposit Co. of MD	May 8, 1984	May 10, 1984	New Orleans, LA $50,000
Chuck's Cartage—see: Weir, Mae			
Contractual Carriers, Inc., Harmony Industrial Park, Newark, DE; motor carrier; National Surety Corp.	Apr. 20, 1983	Aug. 19, 1983	Philadelphia, PA $25,000
Deep South Trucking, Inc., P.O. Box 359, Long Beach, MS; motor carrier; United States Fidelity & Guaranty Co.	Apr. 3, 1984	May 11, 1984	New Orleans, LA $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Fulmer Bros. Transfer & Supply, Inc., 5425 South Orange Blossom Trail, Orlando, FL; motor carrier; Hartford Accident & Indemnity Co. D 5/19/84	Nov. 13, 1972	Jan. 22, 1973	Tampa, FL $25,000
Jet Line Service, Inc., 460 Riverside Industrial Parkway, Portland, ME; motor carrier; Hartford Accident & Indemnity Co. D 6/4/84	May 21, 1980	Oct. 1, 1980	Portland, ME $25,000
Lyon Express, Inc., 3839 Crater Lake Highway, Medford, OR; motor carrier; Federal Ins. Co.	Feb. 24, 1984	June 8, 1984	Seattle, WA $25,000
Pacelli Bros. Transportation, Inc., 119 Trowel St., Bridgeport, CT; motor carrier; Peerless Ins. Co. D 6/15/84	Apr. 22, 1974	Apr. 22, 1974	Bridgeport, CT $25,000
Pennco Trucking, Inc., Sixth & Water Streets, New Cumberland, PA; motor carrier; Ins. Co. of North America	June 5, 1984	June 6, 1984	Baltimore, MD $25,000
Puget Sound Alaska Van Lines, Inc., 2900 11th Ave., S.W., Seattle, WA; water carrier; United Pacific Ins. Co. D 6/4/84	Aug. 24, 1960	Oct. 20, 1960	Seattle, WA $25,000
Rightway Transport Ltd., P.O. Box 179, Woodstock, New Brunswick, Canada; motor carrier; Old Republic Ins. Co.	June 6, 1984	June 6, 1984	Portland, ME $25,000
Robideau's Express, Inc., 26 E. Oregon Ave., Philadelphia, PA; motor carrier; American Motorists Ins. Co.	May 30, 1984	June 4, 1984	Philadelphia, PA $25,000
Sheresky Trucking Inc., 4117 Lakeshore Rd., Burlington, Ontario, Canada; motor carrier; Fireman's Fund Ins. Co. D 8/1/83	Nov. 3, 1981	Dec. 31, 1981	Buffalo, NY $25,000
Arthur E. Smith & Son Trucking, Inc., P.O. Box 1054, Scottsbluff, NB; motor carrier; Fidelity and Deposit Co. of MD	Mar. 30, 1984	June 6, 1984	Houston, TX $100,000
Soo Line Railroad Co., Soo Line Bldg., Box 530, Minneapolis, MN; rail carrier; Continental Casualty Co. (PB 6/28/74) D 6/5/84 [1]	Apr. 13, 1982	May 7, 1982	Minneapolis, MN $100,000
Super Motor Lines, Inc., P.O. Box 10388, Greensboro, NC; motor carrier; Dependable Insurance Co., Inc	May 30, 1984	May 31, 1984	Wilmington, NC $25,000
Jose Torres-Negron, Box 1206, Ponce, PR; motor carrier; Seaboard Surety Co. (PB 3/16/82) D 6/5/84 [2]	Apr. 17, 1984	June 5, 1984	San Juan, PR $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Mae Weir d/b/a Chuck's Cartage, 402 College Ave., Milwaukee, WI; motor carrier; The Ohio Casualty Ins. Co. (PB 3/11/82) D 6/20/84	Oct. 5, 1983	Mar. 12, 1984	Milwaukee, WI $25,000

[1] Surety is American Casualty Company of Reading, PA.
[2] Surety is Insurance Company of North America.

BON-3-03
217136

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback and Bonds Division.

(T.D. 84-151)

Bonds

Approval and discontinuance of consolidated aircraft bonds (air carrier blanket bonds), Customs Form 7605

The following consolidated aircraft bonds have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by the figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: July 13, 1984.

Name of principal and surety	Date term commences	Date of approval	Filed with district director/area director/amount
China Airlines Ltd., 391 Sutter St., 2nd Fl., San Francisco, CA; United Pacific Ins. Co. (PB 5/9/73) D 7/2/84 [1]	June 5, 1984	July 2, 1984	San Francisco, CA $100,000
The foregoing principal has been designated as a carrier of bonded merchandise.			
S. A. Empresa DeViaco Aerea Rio Grandense (Varig Airlines) 630 Third Ave., New York, NY; Insurance Company of North America D 6/26/84	Jan. 31, 1967	Feb. 10, 1967	New York Seaport $100,000

Name of principal and surety	Date term commences	Date of approval	Filed with district director/area director/amount
The foregoing principal has been designated as a carrier of bonded merchandise.			
Western Airlines, Inc., 6060 Avion Dr., Los Angeles, CA; Reliance Ins. Co.	Mar. 26, 1984	Mar. 28, 1984	Los Angeles, CA $100,000
The foregoing principal has been designated as a carrier of bonded merchandise.			

[1] Surety is Pacific Employers Insurance Co.

BON-3-01
217137

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback and Bonds Division.

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19 CFR Part 151

(T.D. 84-152)

Customs Regulations Amendments Relating to the Examination of Imported Merchandise

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to require that, as a general rule, all imported merchandise shall be examined at the place of arrival at the expense of the importer, rather than at "public stores" at Customs expense. A "public store" is a premises owned or leased by the Government and used for the storage of merchandise until it is released from Customs custody. The regulations now provide that unless the importer requests examination at a place other than a public store, merchandise is to be transported from the place of arrival to a public store for examination.

It has been determined that the amendments will decrease Customs costs and liability while allowing more expeditious handling, examination, and release of cargo.

EFFECTIVE DATE: This document is effective on August 20, 1984.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Thomas Davis, Office of Cargo Enforcement and Facilitation, (202-566-5354). Legal Aspects: Jerry Laderberg, Entry Procedures and

Penalties Division (202-566-5765), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under present section 151.6, Customs Regulations (19 CFR 151.6), all imported merchandise is required to be examined at the public stores, except inflammable, explosive, or dangerous merchandise, or any other merchandise which cannot be examined conveniently at the public stores, unless another place is requested by an importer and approved by Customs in accordance with section 151.7, Customs Regulations (19 CFR 151.7). The term "public store" is defined in section 561, Tariff Act of 1930 (19 U.S.C. 1561), as "Any premises owned or leased by the Government and used for the storage of merchandise for the final release of which from Customs custody a permit has not been issued * * *."

Merchandise sent to the public stores for examination under section 151.6 has been opened, examined, and closed by Customs personnel at Customs expense. However, any costs incurred (other than Customs salaries) when merchandise is examined at a place other than the public stores, such as at the wharf or other place of arrival or at the importer's premises, at the request of an importer under section 151.7, are charged to the importer. This has resulted in recurring disputes between Customs and importers involving responsibility for opening/closing cargo packages for Federal examination requirements.

The wording of the current regulations allows an importer with a shipment which requires examination to have the option of requesting examination at a place other than the public stores. Should the importer exercise this option, Customs decides how, when, and where to examine the shipment. If Customs decides to do so at the public stores, it may cost Customs a substantial sum to load and haul the merchandise to that place.

The concept of "public stores" in the traditional sense has waned because Customs facilities, personnel, equipment, and logistical backing necessary to support that function are extremely limited in many locations.

It is clear that Customs may require examination of imported merchandise where it chooses (see section 499, Tariff Act of 1930, as amended (19 U.S.C. 1499)). Further, Customs may require an importer to bear all examination expenses.

Accordingly, by notice published in the Federal Register on January 12, 1984 (49 FR 1531), Customs proposed to amend sections 151.6 and 151.7 to require that, in general, all imported merchandise will be examined at the place of arrival at the importer's expense rather than at the public stores at Customs expense. This would not preclude the importer from requesting examination at a place other than the place of arrival, such as the importer's prem-

ises. Existing public stores would not be abolished, but used much less frequently, and solely at Customs option.

This amendment will not require an importer to pay any costs associated with the salary of a Customs employee in regard to examination of merchandise where such costs are not now paid.

The amendments will benefit not only Customs, but also importers, brokers, and carriers by allowing for expeditious handling, examination, and release of cargo shipments. In addition, these amendments will:

1. Allow maximum utilization of inspectional personnel;
2. Reduce the amount of paperwork and other controls necessary to forward examination packages to public stores;
3. Reduce the possibility of injury to Customs personnel;
4. Reduce instances of liability to Customs for tort claims because of damaged or pilfered merchandise; and
5. Reduce recurring costs of providing and replacing tools needed to conduct cargo examinations.

Discussion of Comments

The only comment received in response to the notice disputed the cited legal authority given to require an importer to bear all examination expenses. Specifically, the commenter stated that these citations do not give Customs such authority.

It has long been recognized that Customs may direct and control the place, time, and conditions of the unloading and exhibition of imported merchandise without expense to the United States. Consequently, Customs may require importers to pay the charges.

This issue was addressed in an opinion of the Attorney General in which it was stated that the purpose of section 461, Tariff Act of 1930 (19 U.S.C. 1461), which states that all merchandise imported shall be unladen in the presence of Customs officers, is to expose the merchandise to enable these officers not only to appraise but to ascertain whether dutiable goods are concealed or prohibited goods introduced (35 O.A.G. 431 (1928)). The statute does not say that the Customs officers shall pay the expense. *There is no reason to imply an undertaking on the part of the United States to pay the costs of acts which it has power to require others to perform at their own expense.*

Although the Attorney General's opinion was concerned with 19 U.S.C. 1461, which pertains to importations of merchandise from contiguous countries (i.e., Mexico and Canada), there is no reason to assume that the law is any different with respect to importations from non-contiguous countries (examinations of which are governed by the provisions of 19 U.S.C. 1467, 1499, and other statutes).

The crucial point is that all imported merchandise is subject to examination by Customs officers without expense to the United States. Both 19 U.S.C. 1499 and section 151.7(b) (1) and (2), Customs

Regulations (19 CFR 151.7(b) (1) and (2)) reflect this position. Section 1499 provides in pertinent part that, "* * * such officer (i.e., Customs officer) shall designate the packages or quantities covered by any invoice or entry which are to be opened and examined for the purpose of appraisement or otherwise and *shall order such packages or quantities to be sent to the public stores or other places for such purpose.*" In addition, sections 151.7 (b)(1) and (b)(2) require importers to arrange for opening and closing of packages subject to examination. Obviously, compliance with these requirements causes importers to incur expenses for the opening and closing of packages, including containers.

Additional authority supporting the position that importers may be required to bear the charges in question may be found in section 151.6, Customs Regulations (19 CFR 151.6), which provides in pertinent part that "* * * any other merchandise which cannot be examined *conveniently* at the public stores shall be examined at the place of arrival, the importer's premises or other suitable place." The argument can be advanced that containerized merchandise cannot be conveniently examined at the public stores, hence Customs may direct, in accordance with section 151.6, that such merchandise will be examined at the place of arrival (for instance at the pier, berth, etc.) with the importer responsible for arranging the opening and closing of packages in accordance with section 151.7.

Accordingly, after a further review of the matter, it is clear that Customs has the authority to require that the importer bear all examination expenses. Therefore, Customs has determined to adopt the amendments, as proposed.

E.O. 12291 and Regulatory Flexibility Act

It has been determined that these amendments are not a "major rule" within the criteria provided in section 1(b) of E.O. 12291, and therefore no regulatory impact analysis is required.

Pursuant to the provisions of section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is hereby certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

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LIST OF SUBJECTS IN 19 CFR PART 151

Customs duties and inspection, Imports.

AMENDMENTS TO THE REGULATIONS

Part 151, Customs Regulations (19 CFR Part 151), is amended as set forth below.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: July 2, 1984.
EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury,

[Published in the Federal Register, July 20, 1984 (49 FR 29372)]

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

1. Section 151.6 is revised to read as follows:

§ 151.6 Place of examination.

All merchandise will be examined at the place of arrival, unless examination at another place is required by the district director or authorized in accordance with section 151.7 of this part. Except where the merchandise is required by the district director to be examined at the public stores, the importer shall bear any expense involved in preparing the merchandise for Customs examination and in the closing of packages.

2. The heading, introductory language, and paragraphs (b) and (c) of section 151.7 are revised to read as follows:

§ 151.7 Examination elsewhere than at place of arrival or public stores.

The district director may authorize examination at a place other than at the place of arrival or the public stores, such as at the importer's premises. If examination at a place other than at the place of arrival or the public stores is authorized it will be subject to the following conditions.

* * * * * * *

(b) *Preparation for Customs examination and closing of packages.* Except when merchandise is required by the district director to be examined at the public stores, the importer shall arrange and bear any expense for preparation of the merchandise for Customs examination and closing of packages.

(c) *Reimbursement of expenses outside port limits.* If the place of examination is not located within the limits of a port of entry or at a Customs station at which a Customs officer is permanently located, whether or not that location is the place of arrival, the importer shall pay any additional expenses, including actual expenses of travel and subsistence but not the salary during regular hours of

duty of the examining officer. However, no collection will be made if the total amount chargeable against one importer for one day amounts to less than 50 cents. If the total amount chargeable amounts to 50 cents or more but less than $1, a minimum charge of $1 will be made.

* * * * * * *

(R.S. 251, as amended, section 461, 46 Stat. 717, section 467, as added June 25, 1938, section 11, 52 Stat. 1083, as amended, section 499, 46 Stat. 728, as amended, section 624, 46 Stat. 759 (19 U.S.C. 66, 1461, 1467, 1499, 1624)).

U.S. Customs Service

PROPOSED RULEMAKINGS

19 CFR Parts 171 and 172

Proposed Customs Regulations Amendments Relating to Delegation of Authority to District Directors of Customs

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to increase the authority of district directors of Customs to act on petitions for relief in administrative cases involving penalties, forfeitures, or claims for liquidated damages, incurred for violations of the customs or navigation laws and regulations. The Customs Regulations would also be amended to provide that the authority to act on certain supplemental petitions would be retained by the Commissioner of Customs. It is expected that this proposed delegation of further authority to district directors will result in more expeditious processing of less complex cases, thereby benefitting the importing and traveling public.

DATE: Comments must be received on or before September 17, 1984.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, DC 20229 (202–566–5746).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), the Secretary of the Treasury is empowered to mitigate or remit fines, penalties, or forfeitures that are incurred under the customs or navigation laws. Section 623(c), Tariff Act of 1930 (19 U.S.C. 1623(c)) empowers the Secretary to cancel any

charge made against a bond for breach of any condition of the bond, upon payment of a lesser amount or penalty or upon such other terms and conditions as the Secretary may deem sufficient. By Subdivision 1(h) of Treasury Department Order No. 165, Revised (T.D. 53654), the Secretary delegated authority to the Commissioner of Customs to act on all cases where the claim for liquidated damages, fine or penalty (including the forfeiture) is not in excess of $100,000. This Order granted full mitigation authority to the Commissioner for specifically listed violations, including all liquidated damages claims.

The Commissioner, by regulation, has delegated some of his mitigation authority to district directors of Customs. Pursuant to section 171.21, Customs Regulations (19 CFR 171.21), district directors are empowered to mitigate or remit fines, penalties, or forfeitures incurred under any law administered by Customs when the total amount of fines or penalties incurred with respect to any one offense, together with the value of any merchandise subject to forfeiture, does not exceed $25,000. Under section 172.21, Customs Regulations (19 CFR 172.21), district directors may cancel claims for liquidated damages arising from breaches of the terms or conditions of any bond when the claim is $50,000 or less. For certain liquidated damages claims the district director is given full authority to act upon the claim, without regard to the amount of the claim. These claims, which include most notably the failure to file timely entry summaries, are outlined in section 172.22, Customs Regulations (19 CFR 172.22).

Pursuant to sections 171.33 and 172.33, Customs Regulations (19 CFR 171.33, 172.33), regional commissioners of Customs are currently empowered to consider supplemental petitions for relief in all cases acted upon by the district directors. Such review is mandated if there has been a specific request on the part of the petitioner for reconsideration by the regional commissioner, or if the district director believes no additional relief is warranted, or if the petitioner is not satisfied with the additional relief granted by the district director.

Over the years it has become clear that district directors can handle many of the less complex cases competently, and more expeditiously than Customs Headquarters. Accordingly, it is proposed to amend the regulations to increase the district directors authority, to compensate for the effects of inflation. District directors would be allowed to decide cases when the liability is $100,000 or less, except with respect to violations of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), in which the jurisdictional amount would remain at $25,000 or less. Supplemental petition review authority would be retained by the Commissioner if the amount of the liability is between $25,000 and $100,000 (inclusive) with respect to penalty and forfeiture cases, and between $50,000 and $100,000 (inclusive) with respect to liquidated damages cases.

The regional commissioners would have this review authority if the liability is $25,000 or less in penalty and forfeiture cases, $50,000 or less in liquidated damages cases.

It is expected that this delegation of further authority to district directors will result in the more expeditious handling of petitions for relief, thereby benefiting both travelers and members of the importing public who have incurred liabilities for violations of the customs and navigation laws. The Commissioner would retain supplemental petition review authority for fines, penalties, or forfeiture cases over $25,000, and liquidated damages cases over $50,000.

It is also expected that this delegation will be accompanied by a program for increased monitoring of the disposition of cases within Customs field offices, as well as an expanded training program for fines and penalties personnel. This will be necessary to ensure uniformity among the district offices in their application of statutes, regulations, policies, procedures, and guidelines used in the disposition of fines, penalties, and forfeiture cases.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted timely to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of section 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 et seq.), it is hereby certified that if adopted, the proposed amendments set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

AUTHORITY

These amendments are proposed under the authority of R.S. 251, as amended (19 U.S.C. 66), section 1, 19 Stat. 247, 249 (19 U.S.C. 197), section 1, 36 Stat. 965 (19 U.S.C. 198), section 624, 46 Stat. 759

(19 U.S.C. 1624), section 641, 46 Stat. 759, as amended (19 U.S.C. 1641), section 648, 46 Stat. 762 (19 U.S.C. 1648).

LIST OF SUBJECTS IN 19 CFR

Part 171
Administrative practice and procedure, Law enforcement, Penalties, Seizures and forfeitures.
Part 172
Administrative practice and procedure, Penalties.

PROPOSED AMENDMENTS

It is proposed to amend Parts 171 and 172, Customs Regulations (19 CFR Parts 171 and 172), as set forth below:

PART 171—FINES, PENALTIES, AND FORFEITURES

1. It is proposed to revise section 171.21 to read as follows:

§ 171.21 Petitions acted on by district director.

The district director may mitigate or remit fines, penalties, and forfeitures incurred under any law administered by Customs, with the exception of penalties or forfeitures incurred under the provisions of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), on such terms and conditions as, under the law and in view of the circumstances, he shall deem appropriate, when the total amount of the fines and penalties incurred with respect to any one offense, together with the total value of any merchandise or other article subject to forfeiture or to a claim for forfeiture value, does not exceed $100,000. The district director may mitigate or remit fines, penalties, or forfeitures incurred under section 592 when the total amount of those fines, penalties or forfeitures incurred thereunder does not exceed $25,000.

2. It is proposed to amend section 171.33, by revising paragraph (b)(1) to read as follows:

§ 171.33 Supplemental petitions for relief.

* * * * * * *

(b) *Consideration—(1) Decisions of the district director.* Where the district director has the authority to grant relief in accordance with the provisions of sections 171.21 and 171.22, he may grant additional relief if he believes it is warranted. If there has been a specific request on the part of the petitioner for review by the regional commissioner or Commissioner of Customs, or if the district director believes no additional relief is warranted, or if the petitioner is not satisfied with the additional relief granted by the district director, the supplemental petition, together with all pertinent documents, shall be forwarded to the regional commissioner of the region in which the district lies if the amount of the liability is $25,000 or less, or to the Commissioner of Customs if the amount of

the liability is more than $25,000 but does not exceed $100,000, for reconsideration and disposition of the case, except as provided in section 171.22(c).

PART 172—LIQUIDATED DAMAGES

1. It is proposed to revise section 172.21 to read as follows:

§ 172.21 Petitions acted on by district director of Customs.

The district director may cancel any claim for liquidated damages incurred on such terms and conditions as, under the law and in view of the circumstances, he shall deem appropriate when the claim is $100,000 or less.

2. It is proposed to revise section 172.33 to read as follows:

§ 172.33 Supplemental petitions for relief.

* * * * * * *

(b) *Consideration—(1) Decisions of the district director.* Where the district director has authority to grant relief in accordance with the provisions of sections 172.21 and 172.22, he may grant additional relief if he believes it is warranted. If there has been a specific request on the part of the petitioner for review by the regional commissioner or Commissioner of Customs, or if the district director believes that no additional relief is warranted, or if the petitioner is not satisfied with the additional relief granted by the district director, the supplemental petition, together with all pertinent documents, shall be forwarded to the regional commissioner of the region in which the district lies if the amount of the liability is $50,000 or less, or to the Commissioner of Customs if the amount of the liability is more than $50,000 but does not exceed $100,000, for reconsideration and disposition of the case, except as provided in section 172.22(d)(3).

* * * * * * *

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 2, 1984.
EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, July 17, 1984 (49 FR 28855)]

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19 CFR Part 175

Receipt of Domestic Interested Party Petition Concerning Tariff Classification of Continuously Cast Iron Bars

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipt of domestic interested party petition.

SUMMARY: Customs has received a petition submitted on behalf of a domestic interested party with respect to the tariff classification of continuously cast iron bars. The petitioner contends that the merchandise is currently incorrectly classified under a duty-free provision of the Tariff Schedules of the United States (TSUS), and should be reclassified under a provision of the TSUS which carries a duty rate of 5.1 percent ad valorem. This document invites comments with respect to the correctness of the current classification of the imported merchandise.

DATE: Comments must be received on or before September 17, 1984.

ADDRESS: Comments (preferably in triplicate) may be submitted to the Commissioner of Customs, Attention: Regulations Control Branch, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8237).

FOR FURTHER INFORMATION CONTACT: James C. Hill, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), a domestic interested party petition has been filed with respect to the tariff classification of imported continuously cast iron bars.

The described merchandise is currently classified under the provision for "Cast-iron articles, not alloyed: [n]ot malleable", in item 657.09, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), at a column 1 duty-free rate. The petitioner contends that the merchandise is properly classified under the provision for "Ingots, blooms, billets, slabs, and sheet bars, all the foregoing of iron or steel: [o]ther than alloy iron or steel", in item 606.67, TSUS, at a column 1 duty rate of 5.1 percent ad valorem.

The petitioner questions whether iron products which are made by a continuous casting method and which meet the dimensional requirements for blooms or billets may be regarded as semifinished articles.

COMMENTS

Pursuant to section 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on this matter, Customs invites written comments from interested parties on the classification and appraisement issues.

The domestic interested party petition, as well as all comments received in response to this notice, will be available for public inspection in accordance with section 103.11(b), Customs Regulations

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(19 CFR 103.11(b)), between the hours of 9:00 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Headquarters, U.S. Customs Service, Room 2426, Washington, D.C. 20229.

AUTHORITY

This notice is published in accordance with section 175.21(a), Customs Regulations (19 CFR 175.21(a)).

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 2, 1984.

EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, July 17, 1984 (49 FR 28884)]

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19 CFR Part 177

Proposed Change of Practice Regarding Tariff Classification of Imported Lace Curtain Material

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed Change of Practice and request for Comments.

SUMMARY: Customs is reviewing its practice of classifying certain lace curtain material imported with one hemmed edge and without lines or patterns indicating where the fabric should be cut. The current practice is to classify the merchandise under the tariff provision for other lace or net articles, not specially provided for, whether or not ornamented. This classification is based upon a 1979 ruling which, it is now believed, may have been predicated upon erroneous information. It is proposed that such imported merchandise be classified under the appropriate provision for lace, in the piece or in motifs, whether or not ornamented. The current practice is being reviewed because it is now questioned whether the merchandise, as imported, is sufficiently dedicated to use as curtains. Further, hemmed curtain fabric is apparently known in the trade and commerce as material or fabric rather than as unfinished curtains.

Because our decision in this matter may have a substantial impact upon importers of the above-described merchandise, and be of interest to the domestic industry, public comments are being invited before any change is made.

DATE: Comments (preferably in triplicate) must be received on or before September 17, 1984.

ADDRESS: Comments should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs is reviewing its practice of classifying certain lace curtain material imported with one hemmed edge and without lines or patterns indicating where the fabric should be cut. This merchandise is currently classified under the provision for other lace or net articles, not specially provided for, whether or not ornamented, in item 386.13, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202).

This classification is based upon a Customs Service ruling dated May 25, 1979 (055443) in which it was stated that an established and uniform practice existed to classify curtain fabrics hemmed at one edge under the provisions for articles of textile materials, not specially provided for. Customs has reexamined this matter and determined that the information upon which that ruling was predicated, that being that an established and uniform practice of classification existed at that time with regard to hemmed curtain fabric, was erroneous. However, since the finding of a practice was made in a Customs ruling, irrespective of the correctness of the finding, Customs cannot now revoke that finding and change the classification of the merchandise to a different provision without compliance with section 315(d), Tariff Act of 1930, as amended (19 U.S.C. 1315(d)), and section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)), which specify the procedure for changing an established and uniform practice. *Rank Precision Industries, Inc.* v. *United States,* 660 F. 2d 476, 68 CCPA 78, C.A.D. 1269 (1981).

In its condition as imported, without cutting lines or other lines of demarcation which would allow the identification of the individual curtains to be made from the material, the subject merchandise is not classifiable as unfinished curtains. See General Headnote 10(h), TSUS; *The Harding Co.* v. *United States,* 23 CCPA 250, T.D. 48109 (1936); *United States* v. *M. H. Rogers, Inc.,* 18 CCPA 271, T.D. 44448 (1930); and *United States* v. *Buss & Co.,* 5 Ct. Cust. Appls. 110, T.D. 34138 (1914). In addition, we do not believe the merchandise is sufficiently dedicated for use as curtains to preclude its classification as material. Hemmed curtain fabric is apparently known in the trade and commerce of this country as material or fabric

rather than as unfinished curtains. The classification of the merchandise should reflect the commercial reality. Accordingly, it is proposed to change the classification of this merchandise so that future importations would be classified under one of the provisions for lace, in the piece or in motifs, whether or not ornamented, in items 351.30 through 351.90, TSUS. The exact tariff classification and rate of duty would depend upon how the lace was made.

AUTHORITY

Because the proposed change, if adopted, could change the amount of duties assessed on the merchandise, and could be of interest to the domestic industry, Customs is giving this notice and opportunity to comment as provided by section 315(d), Tariff Act of 1930, as amended (19 U.S.C. 1315(d)) and section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

COMMENTS

Before making a determination on this matter, Customs will consider any written comments timely submitted to the Commissioner of Customs.

Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulation (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: July 2, 1984.

EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, July 17, 1984 (49 FR 28886)]

(19 CFR Part 177)

Proposed Change of Practice Concerning Tariff Classification of Imported Gloves With Nonfunctional, Nondecorative Stitching

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed change of practice and request for comments.

SUMMARY: This document gives notice that Customs is reviewing its current established and uniform practice concerning the tariff classification of gloves with nonfunctional, nondecorative "X" stitching. The merchandise is currently classified under the provision for ornamented gloves, of textile materials. However, because the stitching is not readily visible on the article, Customs is considering classifying the gloves under the provision for gloves, not ornamented, of textile materials. Public comments are invited regarding this proposed change of practice.

DATE: Comments (preferably in triplicate) must be received on or before September 17, 1984.

ADDRESS: Comments should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs is reviewing its current established and uniform practice of classifying gloves with nonfunctional, nondecorative "X" stitching. These gloves are currently classified under the provisions for ornamented gloves, of textile materials, in items 704.05-704.34, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202). Customs is considering classifying this merchandise under the provisions for gloves, not ornamented, of textile materials, in items 704.40-704.95, TSUS, which would result in a higher rate of duty for most importations of the merchandise. In some instances, the rate of duty might be lowered, which would be of interest to the domestic industry.

Customs previously ruled on July 16, 1974 (file no. 034642), that certain gloves with a double X embroidered design with yarn of the same color as the gloves were ornamented for tariff purposes. That ruling is the apparent basis for the existing practice that gloves with certain "X" stitching, which are the subject of this proposal, are classifiable or ornamented. Whether nonfunctional, nondecorative "X" stitching on the back of the gloves constitutes ornamentation is the sole issue involved. Both the Customs National Import Specialist in New York and the Customs classifying officer in Washington, D.C., agree that such stitching is seldom readily visible. In fact, on some gloves the stitching can only be seen with a magnifying glass.

In order for a feature, such as stitching, enumerated in Headnote 3, Schedule 3, TSUS, to constitute ornamentation, that feature

must increase the eye appeal of the article, by making it more attractive, or by adding something which serves a primarily decorative rather than useful function. *Colonial Corp. of America* v. *United States,* 62 Cust. Ct. 502, C.D. 3815 (1969). The term "ornamented", as defined in Headnote 3, does not embrace all the features listed in Headnote 3 (fibers, filaments, and yarns introduced as needlework or otherwise), but only those which primarily serve to adorn, embellish, decorate, or enhance that article. *Blairmoor Knitwear Corp.* v. *United States,* 60 Cust. Ct. 388, C.D. 3396 (1968).

Stitching which is not readily visible on an article, and particularly stitching which only can be seen with a magnifying glass, cannot be said to either increase the eye appeal of that article, or to adorn, embellish, decorate, or enhance the appearance of that article. *Endicott Johnson Corp.* v. *United States,* 82 Cust. Ct. 49, C.D. 4787 (1979), affirmed 67 CCPA 47, C.A.D. 1242 (1980). Accordingly, such stitching on the gloves in question should not cause those gloves to be classified under the ornamented provisions in the tariff schedules. Customs has ruled, in decisions dated August 30, 1979 (file no. 055437), and September 12, 1979 (file no. 061439), that stitching which was barely visible did not constitute ornamentation for tariff purposes.

We see no conflict between this position and Customs Headquarters ruling of July 16, 1974 (file no. 034642), which, unfortunately, did not comment on the visibility of the stitching there involved. Stitching which is the same color as the fabric on which it is located can be readily visible and we have so ruled on a number of occasions. Accordingly, we interpret that ruling as being concerned with stitching which is readily visible.

Proposed Change of Practice

On the basis of the above information, Customs has determined that the established and uniform practice of classifying gloves with nonfunctional, nondecorative "X" stitching as ornamented, in items 704.05–704.34, TSUS, is clearly wrong. It is Customs position that such gloves should be classified as either ornamented or not ornamented based on the same criteria that are applied to all other textile articles: (1) the "X" stitching on the gloves must be decorative in appearance; (2) the primary purpose of that stitching must be the ornamental effect it imparts; and (3) the decorative appearance of the stitching must be more than merely incidental when viewing the gloves as a whole.

Authority

Because the proposed change of practice, if adopted, will increase the amount of duties assessed on the merchandise, and is of sufficient interest to the domestic industry, Customs is giving the public an opportunity for comment as provided by section 315(d), Tariff

Act of 1930, as amended (19 U.S.C. 1315(d)), and section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

COMMENTS

Before making a determination on this matter, Customs will consider any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was James S. Demb, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: July 2, 1984.

EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, July 17, 1984 (49 FR 28885)]

U.S. Customs Service

General Notice

Certain Importations Bearing Recorded U.S. Trademarks; Solicitation of Economic Data

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of extension of time for comment.

SUMMARY: This notice extends the period of time within which interested members of the public may submit economic data concerning the importation of articles manufactured abroad bearing genuine trademarks without the consent of the registered U.S. trademark owner (so-called "parallel imports" or "grey market goods"). The original solicitation for such data was published in the Federal Register on May 21, 1984 (49 FR 21453). Comments were to have been received on or before July 20, 1984.

Customs has been requested to extend the comment period because additional time is required to notify consumers of the solicitation and to prepare reasonably responsive comments. Customs believes the request has merit. Accordingly, the period of time for the submission of economic data is extended to September 20, 1984.

DATE: Data are requested on or before September 20, 1984.

ADDRESS: Written data (preferably in triplicate) should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

All comments received in response to this notice will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 1.6, Treasury Department Regulations (31 CFR 1.6), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between the hours of 9:00 a.m. to 4:30 p.m. on normal business days, at the Regulations Control Branch, Headquarters, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:
Customs Service aspects

Sam Orandle, Entry Procedures and Penalties Division, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202/566-5765).

Questions Posed by the CCCT Working Group on Intellectual Property

Barbara Luxenberg, Special Assistant to the Assistant Secretary and Commissioner, U.S. Patent and Trademark Office, Department of Commerce, Crystal Plaza 3, Room 11E10, Washington, D.C. 20231 (703/557-3071).

Dated: July 19, 1984.

JOHN P. SIMPSON,
Director, Office of Regulations and Rulings.

[Published in the Federal Register, July 20, 1984 (49 FR 29509)]

448-313 O - 84 - 4

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 84-651)

JULIAN R. WOODRUM, DENNIS DORSEY AND SHERMAN JOHNSON, APPELLANTS, *v.* UNITED STATES, APPELLEE

(Decided July 3, 1984)

Robert S. Baker, of Beckley, West Virginia, submitted for appellants.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, *Velta A. Melnbrencis,* Assistant Director and *Shiela N. Ziff,* of Washington, D.C., submitted for appellee.

Appealed from: U.S. Court of International Trade.

Chief Judge RE.

Before BALDWIN, SMITH and NIES, *Circuit Judges.*

NIES, *Circuit Judge.*

This appeal is from a judgment of the United States Court of International Trade [1] which affirmed the Secretary of Labor's determination that former employees of an independent new car dealership was not eligible for benefits under the worker adjustment assistance program of the Trade Act of 1974, 19 U.S.C. § 2101-2487 (1976). It was held that the firm which employed these workers (appellants here) did not "produce" articles, which is one requirement for eligibility under Section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3). Further, it was held that Congress intentionally chose to treat workers employed in a dealership controlled or substantially beneficially owned by the manufacturer differently from workers employed by an independent dealer. It is noteworthy that Congress considered this issue again, in regard to proposed amendments to Section 222, in 1979, but no legislation remedying this anomaly was enacted into law. Finally, the dissimilar treatment was found to have a "rational basis" in that Congress reasonably could provide benefits only to employees of a firm *producing* import-impacted articles since such workers were most immediately and directly affected by the imports. Thus, the classification of a worker on the basis of whether his firm produced the product could not be overturned on constitutional grounds.

[1] Reported at 5 Ct. Int'l Trade —, 564 F.Supp. 826 (1983).

Appellants' arguments here were fully treated by Chief Judge Re. We agree with his analysis and affirm on the basis of his opinion.

AFFIRMED.

(Appeal No. 83-1371)

FLORSHEIM SHOE COMPANY, DIV. OF INTERCO, INC., APPELLANT, *v.* UNITED STATES, APPELLEE

(Decided July 12, 1984)

William D. Outman, II, of Washington, D.C., argued for appellant.
Mumford Page Hall, II, of Washington, D.C., of counsel.
Michael P. Maxwell, of New York, New York, argued for appellee. With him on the brief were *Richard K. Willard,* Acting Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge NEWMAN.
Before DAVIS, BALDWIN and MILLER, *Circuit Judges.*
DAVIS, *Circuit Judge.*

This is an appeal from a decision of the Court of International Trade (CIT) dismissing, on the defendant's motion, plaintiff Florsheim Shoe Company's (Florsheim's) complaint against the United States (the Government). In that complaint, Florsheim challenged the United States Customs Service's denial of Florsheim's protests against the agency's classification of imported Indian buffalo leather and goat and kid leather, not fancy, as dutiable merchandise. The CIT properly decided that Florsheim was attacking the basis for Customs' denial of the protests—certain Executive Orders in which the President withdrew duty-free treatment (under the Generalized System of Preferences) from those Indian leather products [1]—and held that Florsheim had stated no claim upon which relief could be granted because, to the extent the President's action may be subject to severely limited judicial review, there was no ground for disputing it here. The CIT's opinion is reported at 570 F. Supp. 734 (CIT 1983). Florsheim also challenges an earlier CIT decision, suspending discovery pending disposition of the Government's motion to dismiss. *Florsheim Shoe Company* v. *United States,* No. 83-2 (CIT Jan. 7, 1983). We hold that the CIT did not abuse its discretion in ordering suspension of discovery, and we also affirm its dismissal of Florsheim's complaint.

[1] We too assume that Customs' denial of the protests was prompted by these Executive Orders. The record before us does not include copies of the notices of denial of Florsheim's protests which are required by statute to include a statement of the reasons for the denial. 19 U.S.C. § 1515(a). However, both parties and the Court of International Trade represent (implicitly, if not explicitly) that Customs' action was a direct consequence of the Executive Orders, and we rely on that representation.

I

BACKGROUND

Florsheim is an American shoe manufacturer. It imports buffalo leather and goat and kid leather, not fancy, from India for use in its manufactures.

India has been designated by the President as a "beneficiary developing country" pursuant to the Generalized System of Preferences (GSP). The GSP is a trade program, established by Title V of the Trade Act of 1974,[2] which authorizes the President to provide duty-free treatment for eligible articles imported from qualifying developing nations for the purpose of promoting their economic development. In January 1977, the President placed buffalo leather on the list of articles eligible for duty-free treatment under the GSP. Executive Order No. 11960, 42 Fed. Reg. 4317. In February 1977, however, the President excluded buffalo leather imports from India from this preferential treatment. Executive Order No. 11974, 42 Fed. Reg. 11230A. Similarly, in March 1980, goat and kid leather, not fancy, were added to the list of GSP eligible articles, but Indian imports of these articles were denied duty-free entry. Executive Order No. 12204, 45 Fed. Reg. 20740. Executive Order No. 12204 also continued the denial of duty-free treatment for imports of buffalo leather from India. Executive Order No. 12302 (46 Fed. Reg. 19901), issued in April 1981, then continued the denial of duty-free treatment for imports of buffalo leather and goat and kid leather, not fancy, from India.

In 1979, Florsheim filed a petition with the United States Trade Representative (USTR) requesting the subdivision of item 121.55 of the Tariff Schedules of the United States (TSUS) to create a separate category for water buffalo leather. Florsheim also asked for duty-free treatment of Indian water buffalo leather pursuant to the GSP because "no like or directly competitive article" was produced in the United States as of January 3, 1975, the effective date of the Trade Act of 1974. *See* 15 C.F.R. § 2007. In July 1980, the USTR denied Florsheim's petition on the basis of its determination that an article directly competitive with water buffalo leather was produced in the United States as of January 3, 1975.

In 1980, Florsheim filed another petition with the USTR requesting duty-free treatment for water buffalo leather and goat and kid leather, not fancy, alleging that no like or directly competitive article was produced in the United States in January 1975. The USTR denied this second petition on June 11, 1981 on its finding that there was domestic production of goat and kid leather as well as production of calf leather, a product directly competitive with water buffalo leather.

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[2] 88 Stat. 2066-2071, Pub. L. 93-618, 19 U.S.C. § 2461 *et seq.*

Between September and December 1981, Florsheim filed several protests with the Customs Service disputing the classification of these Indian leather products as dutiable merchandise. The Customs Service denied those protests between October 1981 and February 1982. In April 1982, Florsheim filed its complaint with the CIT, seeking review of Customs' denial of the protests. In that suit, in October 1982, Florsheim served the Government with interrogatories and a request for production. Before responding to those discovery requests, the Government, in November 1982, moved to dismiss the action for failure to state a claim upon which relief could be granted. A short time later, the Government filed an additional motion, asking that the court suspend discovery pending decision on the motion to dismiss. The CIT granted such suspension in January 1983.

The CIT granted the Government's motion to dismiss and entered judgment dismissing the action in July 1983. From an analysis of Florsheim's complaint, the court identified the root of Florsheim's grievance as the President's Executive Orders denying the leather products duty-free treatment under the GSP. It addressed each of the three alleged grounds for the Government's motion:

> (1) Florsheim lacks standing to seek review of the Presidential action challenged by the complaint;
> (2) The President acted within his delegated authority under Section 504 (19 U.S.C. § 2464) in denying duty-free treatment to the leather merchandise; and
> (3) The President's action was not subject to judicial review, except to insure conformity with the President's delegated authority and compliance with the procedural prerequisites to taking action.

On the issue of standing, the court held that Florsheim had statutory standing under 28 U.S.C. § 2631(a) to contest the denial of its protests against the customs duty assessments on the goods it imported. The court also decided, however, that the President's action in limiting the application of duty-free treatment was within his delegated authority under Section 504 and that the court could not review the factual foundation for the President's action.

II

STANDING

We agree with the CIT that Florsheim has standing under 28 U.S.C. § 2631(a) to challenge the Customs Service's denial of its protests. That section confers standing on a person who files a protest pursuant to Section 514 of the Tariff Act of 1930 to bring a civil action (in the Court of International Trade) contesting the denial of the protest.[3] It provides:

[3] *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 22 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3733 ("Proposed section 2631 establishes standing requirements for those who commence a civil action in the Court of International Trade.")

§ 2631. Persons entitled to commence a civil action.

(a) A civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed the protest pursuant to section 514 of such Act, or by a surety on the transaction which is the subject of the protest.

It is undisputed that Florsheim filed several protests with the Customs Service attacking the classification of Indian water buffalo leather and goat and kid leather, not fancy, as dutiable merchandise, and it is also undisputed that these protests were denied. There is nothing in the record before us to indicate, and the Government does not allege, that Florsheim failed to have standing to file a protest pursuant to Section 514 of the Tariff Act of 1930. That provision states, in relevant part:

(a) Except as provided in [exceptions omitted as irrelevant] * * * decisions of the appropriate customs officer, *including the legality of all orders and findings entering into the same,* as to—

* * * * * * *

(2) the classification and rate and amount of duties chargeable;

* * * * * * *

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *.

* * * * * * *

(c)(1) * * * Except as provided in [exceptions omitted as irrelevant] * * * protests may be filed with respect to merchandise which is the subject of a decision specified in subsection (a) of this section by—

(A) *the importers or consignees shown on the entry papers* * * *;

(B) *any person paying any charge or exaction;* * * *

19 U.S.C. § 1514 (emphasis added). Florsheim is the domestic importer of the leather goods, and it also paid the duty on the entries that are the subject of its protests. Either one of these connections to the merchandise qualifies Florsheim, under the terms of the statute, to file a protest. As a party which properly filed protests with the Customs Service pursuant to Section 514 and whose protests were denied, Florsheim would seem to have standing pursuant to 28 U.S.C. § 2631(a) to challenge that denial in the CIT.

The Government contends, however, that "the existence of 28 U.S.C. § 2631 [and, presumably, Florsheim's meeting of its requirements] does not obviate the fact that Section 504's zone of interests

does not encompass importers such as Florsheim." We understand the Government's argument to be that Section 2631(a) is not an implied grant of subject matter jurisdiction permitting, without more, judicial review of Customs' denial of *all* protests, no matter the administrative basis for them. We find it difficult to accept the Government's overriding premise as to the need for a proper protester also to be within some external "zone of interests," but even if we assume *arguendo* the correctness of that general position, Florsheim would still have standing to maintain this action because its interests are within the "zone of interests" of Section 504 (19 U.S.C. § 2464).

"Zone of interests" is a shorthand description of a test for standing, requiring that a complainant show that the interest it seeks to protect is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 153 (1970). *See also Valley Forge, supra,* 454 U.S. at 475; *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 100 n.6 (1979); *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 39 n.19 (1976).[4]

Section 504 of Title V of the Trade Act of 1974 (the Act), 19 U.S.C. § 2464, is entitled "Limitations of Preferential Treatment," and it describes the circumstances in which the President may or must limit duty-free treatment of eligible articles from beneficiary countries and the factors which go into that decision. It is incontestable that Congress was aware, when it enacted this legislation and the rest of Title V of the Act, that it was creating another layer of import duty regulations, and was thus regulating importers, who must pay the duties imposed. Those importers are directly interested in the working of the Act. This is more than sufficient, in itself, to bring Florsheim within the zone of interests of the Trade Act.

We note, moreover, that the regulatory scheme enacted pursuant to Title V of the Act (which includes, of course, Section 504) and to the related Executive Order 11846 (40 Fed. Reg. 14291, March 31, 1975)[5] established a system which invites and considers the opinions of importers on GSP policy. That system consists of a Trade Policy Staff Committee (TPSC) which prepares recommendations (reviewed by the USTR) for the President regarding whether (1) additional articles should be designated as eligible for the GSP; (2) duty-free treatment accorded to eligible articles should be with-

[4] The "zone of interests" test is a non-constitutional prudential limitation on a court's exercise of jurisdiction in contrast to the mandatory Article III requirement that a would-be litigant demonstrate that it has suffered an actual injury which can be fairly traced to the challenged action and which is likely to be redressed by a favorable decision. *Valley Forge Christian College* v. *Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982). As an importer of the Indian leather at issue, Florsheim's financial interest in the action it challenges and the likelihood that a favorable decision would redress its injury (the paying of duties) are undisputed.

[5] Executive Order 11846 conferred upon the Special Representative for Trade Negotiations the responsibility (in consultation with the Secretary of State) for administration of the GSP.

drawn, suspended, or limited; or (3) product coverage should be otherwise modified. 15 C.F.R. § 2007.2. These recommendations are prompted by a request from an "interested party or foreign government" (or by the TPSC on its own motion) that present GSP policy be altered. The regulations define "an interested party" as covering:

> a party who has a significant economic interest in the subject matter of the request, or any other party representing a significant economic interest that would be materially affected by the action requested, such as a domestic producer of a like or directly competitive article, a *commercial importer* or retailer *of an article which is eligible for the GSP or for which such eligibility is requested.*

Id. § 2007.0(c) (emphasis added). The regulations go on to direct the petitioner to include in his request for designation of an additional article as eligible for the GSP information regarding, *inter alia*, "*How the GSP treatment would affect the petitioner's business* and the industry producing like or directly competitive articles in the United States * * * ." *Id.* § 2007.1(a)(4)(i) (emphasis added). Similarly, petitioners asking for withdrawal, suspension, or limitation of duty-free treatment are asked to include information on "*the effect imports receiving duty-free treatment under the GSP have on* competition and *the business of the interest on whose behalf the request is made* * * *." *Id.* § 2007.1(a)(5)(viii) (emphasis added). In other words, the regulations invite petitions from importers regarding GSP treatment and ask that they supply information on the impact of the requested or present policy on their specific business interests. Thus, the Government itself has acknowledged, in the regulations it promulgated pursuant to the statutory GSP scheme, that the interests of commercial importers, as well as others, are relevant to determining GSP policy and that it considers those interests in making recommendations to the President.

Finally, there is adequate evidence on the very face of the statute, especially Section 504(d) (19 U.S.C. § 2464(d)), that Congress intended to protect the interests of importers of goods entitled to preference. That section provides, *inter alia*, that compulsory withdrawal of duty-free treatment under the terms of Section 504(c) (19 U.S.C. § 2464(c)) is not required for articles for which no competitive product was produced in the United States in January 1975. *See* notes 11 and 12 *infra*, and accompanying text. The Government argues that this provision merely extinguishes the rights of entities seeking to compel the President to withdraw duty-free treatment pursuant to Section 504(c)(1)(B). In the Government's opinion, Section 504(d) is merely a defense which may be asserted by the President against those who demand that duty-free treatment must be denied according to the terms of Section 504(c)(1)(B)—but that no domestic importer has any litigable interest at all. The Government cites no authority for its interpretation of § 504(d), and we

find no support for it in the legislative history or the implementation of that provision. In our view, the Government's reading is too narrow, and we agree with Florsheim that it is more reasonable to interpret § 504(d) as encompassing the interests of domestic importers. As pointed out by Florsheim, the entities that are benefited by § 504(d) and aggrieved by the President's failure to follow it are the beneficiary developing nation which exports the merchandise in question and the domestic importer.

For these various reasons, we hold that Florsheim can sue under 28 U.S.C. § 2631(a), and that its interests are "arguably within the zone of interests sought to be protected or regulated" by Section 504.[6]

III

Presidential Authority Under Section 504

Section 504, 19 U.S.C. § 2464, gives the President certain authority to end or withdraw duty-free treatment accorded under the GSP. In this case, the CIT read Florsheim's complaint, without dispute, as a charge that "the President improperly denied duty-free treatment to the subject merchandise under the competitive need formula of Section 504(c)(1)(B) because the USTR erred in his determination under Section 504(d) that articles like or directly competitive with the imported merchandise were produced in the United States on January 3, 1975." 570 F. Supp. at 738.[7]

We find it unnecessary, however, to reach the questions of the President's authority under Section 504(c)(1)(B) or of the alleged determinations under Section 504(d). Section 504(a) (19 U.S.C. § 2464(a)), another provision of Section 504 considered by the CIT below and invoked by the pertinent Executive Orders (*see* subpart D, *infra*), is sufficient authority, in itself, for the President's limitation here of preferential duty treatment. We therefore confine our consideration to that provision.

Section 504(a) declares (as it appears in Title 19, U.S.C.):

> The President may withdraw, suspend, or limit the application of the duty-free treatment accorded under section 2461 of this title with respect to any article or with respect to any country; except that no rate of duty may be established in respect of any article pursuant to this section other than the rate which would apply but for this subchapter. In taking any

[6] The Government discusses the cases of *Colligan* v. *Activities Club of New York, Ltd.*, 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971), and *Peoples Gas, Light & Coke Co.* v. *United States Postal Service*, 658 F.2d 1182 (7th Cir. 1981), at some length. These cases are inapposite because they hold only that the plaintiffs were not within the zone of interests protected by the statutes under which they were suing, the Lanham Act (*Colligan*) and the Postal Reorganization Act (and other Postal Service legislation) (*Peoples Gas*). As the Government itself points out, the parameters of a statute's "zone of interests" vary from statute to statute and must be decided within the context of the particular statute.

[7] Section 504(c)(1)(B) *requires* the President, if he determines that a certain specified standard has been met, to withdraw duty-free status, unless he nevertheless finds certain other listed facts or qualifications to exist. *See* note 10, *infra*. Subsection (d) of Section 504 declares (in part): "Subsection (c)(1)(B) of this section does not apply with respect to any eligible article if a like or directly competitive article is not produced on January 3, 1975, in the United States." *See* note 11, *infra*.

> action under this subsection, the President shall consider the factors set forth in sections 2461 and 2462(c) of this title.[8]

A

We join the CIT in interpreting this subsection (a) as an explicit grant to the President of plenary authority—just as the statutory text indicates—to "withdraw, suspend, or limit" GSP duty-free treatment after consideration of the factors listed in Sections 501 and 502(c), *supra*. This broad, discretionary reading is fully supported by the legislative history. The House Report says with respect to the provision which became Section 504(a):

> The President would be authorized to withdraw, suspend, or limit preferences *at any time* with respect to any article or any beneficiary developing country. In taking such action, the President would be required to consider the factors taken into account in granting preferential treatment initially and in designating beneficiary countries. (Emphasis added.)

H.R. Rep. No. 571, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7355–56. In contrast, the next paragraph of the legislative history, describing the future Section 504(c), sharply limits the Executive's discretion:

> The President would be *required* to withdraw or suspend preferential treatment from any country which ceases to be eligible under the requirements of section 502(b) * * *. The competitive need formula is in general designed to provide an *express requirement governing the withdrawal or suspension of preferential treatment* in those cases where it can no longer be justified * * *.

Id. at 7356–57 (emphasis added).[9] Use of the term "may" (in Section 504(a)) in the phrase "The President may withdraw, suspend,

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[8] Section 2461 [of Title 19, Section 501 of the Trade Act] lists the factors which go into the President's decision to provide duty-free treatment for eligible articles from a beneficiary developing country in the first instance. They are:

(1) The effect such action will have on furthering the economic development of developing countries;

(2) The extent to which other major developed countries are undertaking a comparable effort to assist developing countries by granting generalized references [sic] with respect to imports of products of such countries; and

(3) The anticipated impact of such action on United States producers of like or directly competitive products.

Section 2462(c) [of Title 19, Section 502(c) of the Trade Act] lists the factors which the President takes into account in determining whether to designate a country as a beneficiary developing country:

(1) An expression by such country of its desire to be so designated;

(2) The level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors which he deems appropriate;

(3) Whether or not the other major developed countries are extending generalized preferential tariff treatment to such country; and

(4) The extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country.

[9] The House Conference Report also indicates that § 504(c) is a mandatory provision. It says plainly, "The House bill *terminates* preferential treatment for a particular article from a particular country * * * [when the competitive need formula is met (*see* note 10)]." H.R. No. 1644, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7367, 7398. The House bill originally provided that this limitation could be waived by the President for reasons of national interest, but the Senate proposed an amendment (which was adopted) "restrict[ing] the President's authority to waive * * * [the limitation] * * * [to certain specified circumstances (*see* note 10)]." *Id.*

or limit preferences * * *'" likewise strongly indicates that Congress granted the President broad discretion to take the described actions. *See Southern Railroad Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979).

We must also bear in mind that the subject matter of Section 504 is intimately involved with foreign affairs, an area in which congressional authorizations of presidential power should be given a broad construction and not "hemmed in or 'cabined, cribbed, confined' by anxious judicial blinders." *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 334 F.2d 622, 632 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965).

Section 504(c)(1)(B) and 504(d) neither add to nor diminish the President's discretion under 504(a). Section 504(c)(1)(B), as mentioned above, is a *mandatory* provision, requiring that the President deny duty-free treatment when he determines that the imports meet the "competitive need formula"—unless he makes certain alternative findings.[10] Section 504(d) says only that § 504(c)(1)(B) is inapplicable with respect to an eligible article if a competitive article was not produced in the United States on January 3, 1975 or if the dollar value of imports of that article falls below a certain level.[11] The provisions of this subsection (d) would be relevant only if we were to consider the president's authority under Section 504(c), which we do not do.[12] In short, subsection (a) is unaffected by subsections (c) and (d).

Florsheim then argues that, even so, Section 504(a) does not authorize the withdrawal of duty-free treatment from a *specific* article from a *particular* country. It maintains that, under that section, the President may delete a country from the list of beneficiary de-

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[10] Section 504(c)(1) provides:

Whenever the President determines that any country—

(A) Has exported (directly or indirectly) to the United States during a calendar year a quantity of an eligible article having an appraised value in excess of an amount which bears the same ratio to $25,000,000 as the gross national product of the United States for the preceding calendar year, as determined by the Department of Commerce, bears to the gross national product of the United States for calendar year 1974, or

(B) Except as provided in subsection (d) of this section, has exported (either directly or indirectly) to the United States a quantity of any eligible article equal to or exceeding 50 percent of the appraised value of the total imports of such article into the United States during any calendar year, then, not later than 90 days after the close of such calendar year, such country shall not be treated as a beneficiary developing country with respect to such article, except that, if before such 90th day, the President determines and publishes in the Federal Register that, with respect to such country—

(i) There has been an historical preferential trade relationship between the United States and such country,

(ii) There is a treaty or trade agreement in force covering economic relations between such country and the United States, and

(iii) Such country does not discriminate against, or impose unjustifiable or unreasonable barriers to, United States commerce,

then he may designate, or continue the designation of, such country as a beneficiary developing country with respect to such article.

[11] Section 504(d) provides:

Subsection (c)(1)(B) of this section does not apply with respect to any eligible article if a like or directly competitive article is not produced on January 3, 1975, in the United States. The President may disregard subsection (c)(1)(B) of this section with respect to any eligible article if the appraised value of the total imports of such article into the United States during the preceding calendar year is not in excess of an amount which bears the same ratio to $1,000,000 as the gross national product of the United States for that calendar year, as determined by the Department of Commerce, bears to the gross national product of the United States for calendar year 1979.

[12] The legislative history of this subsection (d) (as well as its text) supports our view that it comes into play only when Section 504(c)(1)(B) is involved. That history discusses the future Section 504(d) solely in the context of the Section 504(c)(1)(B) competitive need formula, saying, merely, "The 50 percent ceiling would not apply in the case of articles where no like or directly competitive product is produced in the United States." H.R. Rep. No. 571, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7356.

veloping nations, *or* he may withdraw an article from the list of eligible articles. In other words, the President may only limit duty-free treatment for a particular article from all countries or for all articles from a particular country.

Florsheim's over-emphasis on the word "or" in Section 504(a) ("with respect to any article *or* with respect to any country" (emphasis added)) as restricting the President's power, leads to an interpretation of the President's authority that is at odds with the clause's overall provision that "the President may withdraw, suspend, or *limit* the application of the duty-free treatment * * * with respect to any article or with respect to any country * * * ." (Emphasis added.) The only (or at least the best) way by which the President can "limit" the application of duty-free treatment respecting a particular country is to exclude certain articles from that country from duty-free treatment. The same is true for limiting the application of duty-free treatment with respect to an article; that can be done by limiting the countries to which duty-free treatment is given for that article.

Florsheim's response that the word "limit"

> simply means that the President can restrict the quantity of a particular article which will be permitted duty-free treatment under the GSP when imported from all countries, or restrict the quantity of all duty-free articles imported from a particular beneficiary developing country

is unacceptable. That restricted view of "limit," as simply giving the President the authority to impose quantitative limits on GSP treatment, would make the term "limit" superfluous. Section 504(a) already gives the President authority to "suspend" GSP treatment. If the President "limits" preferential treatment by setting a quota for the number of articles which will be permitted to enter the United States duty-free, he is effectively suspending duty-free treatment at a pre-determined point in time. On Florsheim's reading, "limit" would play no separate role at all.

Above all, we must remember that this is a statute giving broad discretionary authority to the President in a field trenching very closely upon foreign affairs and on our relations with other countries. Though an "or" in a statute may often call for a disjunctive interpretation, "this canon is not inexorable, for sometimes a strict grammatical construction will frustrate legislative intent." *United States* v. *Moore,* 613 F.2d 1029, 1040 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 954 (1980). Here, the completely disjunctive meaning of "or" ("any article" *or* "any country") which Florsheim stresses would clearly result in an unreasonable, overly narrow, and self-contradictory interpretation not suitable for a statute of this character. Words are not, after all, "pebbles in alien juxtaposition; they have only a communal existence * * * ." *National Labor Relations Board* v. *Federbush Co.,* 121 F.2d 954, 957 (2d Cir. 1941) (per L. Hand, J.).

B

Nor can we accept appellant's point that, if Section 504(a) is interpreted as empowering the President to take the action challenged here, the statute embodies an unconstitutional delegation of Congress' commerce power. In that connection we repeat that the subject matter of Section 504 involves foreign affairs, an area in which broad grants by Congress of discretion to the Executive are common. *See South Puerto Rico Sugar, supra,* 334 F.2d at 631–32 ("In the external sector of the national life, Congress does not ordinarily bind the President's hands so tightly that he cannot respond promptly to changing conditions or the fluctuating demands of foreign policy."). In this instance Congress has in fact circumscribed the President's discretionary authority under Section 504(a) with general guidelines for its exercise. Prior to taking action under that section, the President must consider the factors set forth in Sections 501 and 502(c). *See* note 8, *supra.* In addition, the President's authority under Section 504(a) is limited—although he may withdraw preferential treatment entirely, he may not adjust rates of duty. He is also required to report to Congress pursuant to Section 505. These restrictions are certainly adequate to insure that the statute is not an improper delegation of legislative authority. *See United States* v. *Yoshida International, Inc.,* 526 F.2d 560, 582–83 (CCPA 1975).

C

Once it is determined, as we have just done, that the President's exercise of his authority under Section 504(a) to limit duty-free treatment for these Indian leather goods was within his constitutionally delegated power, there is no further role for the CIT or for this court. Both Supreme Court and Court of Customs and Patent Appeals precedent have established that the Executive's decisions in the sphere of international trade are reviewable only to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with the relevant procedural requirements. The President's findings of fact and the motivations for his action are not subject to review. *United States* v. *George S. Bush & Co.,* 310 U.S. 371, 379–80 (1940); *United States Cane Sugar Refiners' Association* v. *Block,* 683 F.2d 399, 404 (CCPA 1982); *Aimcee Wholesale Corp.* v. *United States,* 468 F.2d 202, 206 (CCPA 1972).

Although Section 504(a) prescribes certain factors that the President must consider in making his decision (*see* note 8, *supra*), these factors do not amount to a formula for the decision-making process which can be judicially reviewed. Although the President must consider these factors, he has discretion to ascertain their significance and is also at liberty to consider other, possibly countervailing, fac-

tors. As the Supreme Court noted in *United States* v. *George Bush, supra:*

> It has long been held that where Congress has authorized a public officer to take some specified legisiative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, *the judgment of the officer as to the existence of the facts calling for that action is not subject to review* [citations omitted] (emphasis added).

310 U.S. at 380. In short, the presidential decision is a "multifaceted judgmental decision," for which there is "no law to apply." *See Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 673 F.2d 1254, 1262 (CCPA), *cert. denied,* 103 S. Ct. 256 (1982); *Cf. Citizens to Preserve Overton Park, Inc.*, v. *Volpe,* 401 U.S. 402, 410 (1971). After it is decided that the President has congressional authority for his action, "his motives, his reasoning, his finding of facts requiring the action, and his judgment, are immune from judicial scrutiny." *United States Cane Sugar Refiners' Association* v. *Block, supra,* 683 F.2d at 404.

D

Florsheim counters that, in any event, the foregoing principles are all inapplicable here because the President did not in fact act under the discretionary authority of Section 504(a) but only under Section 504(c)(1)(B), *supra,* a mandatory provision Congress also inserted in Section 504. We reject that position because the pertinent Executive Orders show on their face that they do invoke Section 504(a).

Executive Order No. 12302, issued on April 1, 1981 (prior to the entry date of 121 of the 122 entries that are the subject of this action) cites Section 504(a) as well as Section 504(c) as authority for the President's action. It reads, in pertinent part:

> By virtue of the authority vested in me by the Constitution and statues of the United States of America, including Title V of the Trade Act of 1974 * * * and as President of the United States of America, in order to modify, as provided by *Sections 504 (a) and (c) of the Trade Act of 1974* * * * the limitations on preferential treatment for eligible articles from countries designated as beneficiary developing countries * * * (emphasis added).

Likewise, Executive Order No. 12204, issued in March 1980, (which covers the first of the 122 entries) cites the President's authority under Title V of the Trade Act of 1974 (which, of course, includes Section 504(a)) in addition to its specific reference to Section 504(c). It reads:

> By virtue of the authority vested in me by the Constitution and statutes of the United States of America, *including Title V of the Trade Act of 1974* * * *, and as President of the United

> States of America, in order to modify, as provided by Section 504(c) of the Trade Act of 1974 * * * the limitations on preferential treatment for eligible articles from countries designated as beneficiary developing countries * * * (emphasis added).

Appellant contends that, nevertheless, Section 504(a) was not the "real" basis for the President's action; according to Florsheim, the President actually acted under Section 504(c)(1)(B). As one basis for this argument, Florsheim points out that Section 504(a) was not specifically cited as authority in the President's various Executive Orders concerning water buffalo leather and goat and kid leather, not fancy, until Executive Order 12302 was issued in April 1981. The prior Executive Orders which excluded these leather products from duty-free treatment (*see supra* Part I) cited Title V of the Trade Act of 1974 and also Section 504(c) as authority for the action.

It is sufficient, in order to show that Section 504(a) was invoked, that the pertinent Executive Orders cited that particular provision or (in the case of one entry) the portion of the Act that encompassed that provision. In *Cane Sugar, supra,* those appellants argued that the text of a presidential proclamation did not reflect the President's "real purpose" in issuing the proclamation and the actual source of authority for his action. The response made by the Court of Customs and Patent Appeals is appropriate here:

> [Appellant's] concentration on what it insists was the President's real purpose is simply irrelevant * * *. In sum, let the President's action be authorized, and let his action be within the authorizing provisions of the law he cites, and the role of the judiciary is at an end.

Id.; see also United States v. *Morgan,* 313 U.S. 409, 420, 422 (1941) ("It is not for us to try to penetrate the precise course of the Secretary's reasoning.") In this case, as in *Cane Sugar,* the courts may not go behind the Executive Orders to search for the "actual" basis for the President's action. The CIT was thus correct in refusing to ascertain whether the President's limitation of preferential treatment was "really" taken under Section 504(a) or whether the President believed he was acting pursuant to Section 504(c) alone.[13]

IV

Suspension of Discovery

We now turn briefly to Florsheim's subsidiary contention that the CIT wrongfully granted the Government's motion to suspend discovery pending disposition of the motion to dismiss. Questions of the scope and conduct of discovery are, of course, committed to the

[13] We do not address Florsheim's claim that the CIT should have determined whether the proper factual predicate existed for presidential action under Section 504(c)(1)(B) (*i.e.,* whether the findings of the USTR relevant to Section 504(d) were correct or based upon a proper reading of the statute) because of our holding that Section 504(a), by itself, provides adequate authority for the President's action.

discretion of the trial court. *Marroquin-Manriquez* v. *INS,* 699 F.2d 129, 134 (3d Cir. 1983). We find no abuse of that discretion here. The issues raised by the Government's motion to dismiss—Florsheim's standing, the President's authority under Section 504, and the court's scope of review over the Preident's exercise of that authority—are all questions of law for which factual discovery is not necessary or appropriate. Florsheim says that it wanted to prove conclusively through discovery that the "basis for the President's denial of duty-free treatment under the GSP was, as a matter of fact, Section 504(c)(1)(B), not Section 504(a)." But, as we have said *supra,* the CIT has no authority to look behind the Executive Orders. It was bound to take them at face value. As we have pointed out, the Executive Orders which cover the merchandise at issue, 12204 and 12302, both cite Section 504(a) as at least an alternative ground for the action taken. Executive Order 12302, which covers 121 of the 122 entries in question, cites Section 504(a) specifically, and Executive Order 12204, covering the first of the 122 entries, cites Title V of the Trade Act of 1974, which includes Section 504(a). That is quite enough.

On these grounds, both the CIT's order suspending discovery and its dismissal of Florsheim's complaint are affirmed.

AFFIRMED

(Appeal No. 83-1106)

JARVIS CLARK CO., PLAINTIFF/APPELLANT *v.* UNITED STATES, DEFENDANT/APPELLEE

(Decided July 17, 1984)

Edward N. Glad, of Los Angeles, California, argued for appellant.

Michael P. Maxwell, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge International Trade Field Office.

Appealed from: United States Court of International Trade.
Judge FORD.

ORDER

ON PETITION FOR REHEARING

Before KASHIWA and SMITH, *Circuit Judges,* and WISDOM,* *Senior Circuit Judge.*

*The Honorable John Minor Wisdom, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

WISDOM, *Senior Circuit Judge.*

The government's petition for rehearing is denied. The government's brief on petition for rehearing is full of sound and fury, but advances no argument that the Court did not consider in its first decision.

The government again argues that the text and legislative history of the 1980 Customs Courts Act demonstrate no intent to modify the dual burden of proof. We think it manifests that 28 U.S.C. § 2643(b) was intended to do just that. For convenience we again quote the relevant statutory language and legislative history:

> (b) If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

28 U.S.C. § 2643(b) (Supp. V 1971).

> Subsection (b) is a new provision that empowers the Court of International Trade to remand the civil action before it for further judicial or administrative proceedings. In granting this remand power to the court, the Committee intends that the remand power be coextensive with that of a federal district court. In addition, this subsection authorizes the court to order a retrial or rehearing to permit the parties to introduce additional evidence.
>
> Subsection (b) has particular impact on civil actions brought pursuant to section 515 or 516 of the Tariff Act of 1930. Under existing law, for example, in a civil action commenced under the court's jurisdiction to entertain cases involving the classification or valuation of merchandise, if the plaintiff succeeds in demonstrating that the original decision of the Customs Service was incorrect but is unable to establish the correct classification or valuation, the court dismisses the civil action. In effect, the court holds in favor of the United States even though the plaintiff has demonstrated that the challenged decision of the Customs Service was erroneous. Subsection (b) would permit the court in this situation to remand the matter to the Customs Service to make the correct decision or to schedule a retrial or rehearing so that the parties may introduce additional evidence.

House Report at 60–61, 1980 U.S. Code Cong. & Ad. News at 3772. In other words, when the trial court finds that the government's proposed classification is wrong but cannot determine the correct classification, it has three options: it may retry, rehear, or remand the case to find the correct answer. The government would interpret the statute as providing a fourth option: the trial court may, in its discretion, simply choose to reach an incorrect decision. This

interpretation is at odds with the clear congressional intent. If § 2643 is to have the impact Congress intended, the trial court must consider whether the government's classification is correct, based on the evidence brought before it. In this case, we conclude that the plaintiff showed that the government was wrong, but did not clearly establish the correctness of its own classification. Following the mandate of § 2643 we remand the case to the trial court so that court can take the course best suited to determining the correct classification.[1]

The government also contends that our decision will upset the administration of the customs law. To the contrary, the abolition of the dual burden will add a stability to the customs laws that has been lacking. A judicial decision will now represent a statement of correct law, useful to future importers, rather than simply a narrow ruling based on the particular circumstances in the case.

We think it appropriate to caution both the government and private parties not to read more into our decision than is there. We do not at this time decide the extent to which res judicata and binding precedential effect should attach to classification decisions. Nor do we in any way weaken the requirement that a classification plaintiff overcome the presumption of correctness that attaches to a government classificaton. The burden is still on the plaintiff to prove the government's classification to be incorrect, and the court still decides this question on the basis of the evidence presented. As we noted in our original opinion, slip op. at 8, "ordinarily it will be difficult to meet this burden of proof without proposing a better classification." The best proof that a customs classification is wrong is proof that a different classification is right, or at least preferable. In the present case we conclude that were we forced to choose between the government's classification ("railway rolling stock") and the plaintiff's alternative ("extracting machinery") we would chosse the latter. In such a case it defies common sense to hold that the government's classification must stand because another classification (the "basket" provision) not advanced by the plaintiff may be even better. But when a plaintiff cannot point to a more appropriate classification, only the most unusual circumstances would permit a court to conclude, on the basis of the evidence before it, that the plaintiff had overcome the presumption of correctness.

DENIED

[1] The government also contends that our decision overrules not only the case mentioned in our original opinion but also *United States* v. *Arnold Pickle & Olive Co., 659 F.2d 1049* (C.C.P.A. 1981). In that case the Court held that the government's method of valuation was incorrect but nevertheless reversed a judgment for the plaintiff because the plaintiff's method was incorrect as well. The court acknowledged, however, the propriety of rehearing or retrial under § 2643(b) "in appropriate circumstances". *Id.* at 1052 n.7. Because of the confused procedural posture of that case the Court was not asked to define "appropriate circumstances" in its initial opinion; and, as the government acknowledges, the Court later permitted the plaintiff to seek similar relief in the trial court. In the present case the plaintiff has explicitly made a focused attack on the dual burden of proof, and has provided persuasive authority to support its contentions.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani

Senior Judges

Nils A. Boe

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 84-79)

TEXAS INSTRUMENTS INCORPORATED, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 76-2-00443

Before: Hon. JAMES L. WATSON, *Judge.*

ORDER

Upon consideration of plaintiff's motion for clarification and for voluntary dismissal, and noting that defendant does not oppose this motion, and upon consideration of all other papers and proceedings had herein, it is hereby

ORDERED, ADJUDGED, AND DECREED that plaintiff's motion is granted, and it is further hereby

ORDERED, ADJUDGED, AND DECREED that this Court's opinions, decisions, and judgments contained in C.D. 4867 (85 Cust. Ct. 43) and Slip Op. 82-30 (3 CIT 114), having been issued prior to this Court's granting plaintiff's motion for rehearing on August 3, 1982, are vacated and without any precedential effect, and it is further hereby

ORDERED, ADJUDGED, AND DECREED that the subject action is dismissed.

New York, New York, July 6, 1984.

(Slip Op. 84-80)

OLD REPUBLIC INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Before MALETZ, *Senior Judge.*

Court No. 83-10-01450

(Dated July 6, 1984)

OPINION AND ORDER

Sandler & Travis, P.A. (Mark D. Crames on the brief) for plaintiff.
Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, of counsel (*Jerry P. Wiskin* on the briefs) for defendant.

MALETZ, *Senior Judge:* The government has moved to dismiss this action for lack of jurisdiction on the ground that the protest filed by the plaintiff was insufficient to give the Customs Service (Customs) information as to the claim it now raises and thus is invalid. The court disagrees and denies the motion to dismiss.

BACKGROUND

Plaintiff, Old Republic Insurance Company (Old Republic), is surety on a bond for a company that made two entries of diesel engines on August 9, 1979 and January 7, 1980. Both entries were liquidated by Customs more than one year from the date of entry at rates of duty higher than the entered rates. More particularly, the first entry was liquidated on January 30, 1981, while the second entry was liquidated on February 20, 1981.[1] Customs then made a demand for payment on the surety, Old Republic, which paid the increased duties and thereafter, on June 29, 1981, filed a timely protest.[2] Its protest read in part as follows:

> (3) We protest the issuance to Protestant of the duties resulting from the liquidation of the subject entries. We claim that such Formal Demand on Protestant is unenforceable by reason of the equitable doctrine of laches. There was an unreasonable delay between the payment of estimated duties on the subject entries and the liquidation which resulted in the demand for additional customs duties.

Following this, Old Republic wrote Customs on January 12, 1982 stating that the liquidation was a nullity due to Customs' failure, in violation of 19 C.F.R. § 159.12, to notify it of the extension of liquidation. Again, on January 4, 1983, Old Republic wrote Customs to the same effect and requested that its protest be granted. On April 22, 1983, Customs denied the protest on the basis that the "[e]xtension and liquidation are valid."

The present suit followed, alleging that Customs' liquidation and demand on Old Republic are illegal, null and void due to Customs' failure to send it a notice of extension of liquidation, as required by

[1] 19 U.S.C. § 1504(a) provides that merchandise not liquidated within one year from the date of entry shall be deemed liquidated at the entered values. Setion 1504(b) contains a proviso, however, that Customs may, for specified reasons, extend this period by giving appropriate notice. In this connection, 19 C.F.R. § 159.12 authorizes Customs to extend the one-year statutory period for liquidation for an additional one-year period, but requires it to notify the importer and his surety promptly that the time has been extended and the reasons for doing so.

[2] 19 U.S.C. § 1514(c)(2) allows a surety to file a protest "within 90 days from the date of mailing of notice of demand for payment against its bond."

by 19 C.F.R. § 159.12. Accordingly, Old Republic contends that by virtue of 19 U.S.C. § 1504(a) the entries in question must be deemed liquidated by operation of law at the entered values.

DISCUSSION

Against this background, the government moves to dismiss the action, arguing that Old Republic's protest did not raise the claim that the liquidation was invalid. The argument lacks merit.

In the first place, paragraph (3) of the protest, as indicated above, states in part that Old Republic "protests the issuance to * * * [it] of the duties resulting from the liquidation of the subject entries." The paragraph further states that "[t]here was an unreasonable delay between the payment of estimated duties on the subject entries and the liquidation which resulted in the demand for additional duties." This was sufficient to advise knowledgeable Customs officials that the liquidation of the entries was being protested. "[H]owever cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest * * * if it conveys enough information to apprise knowledgeable officials of the * * * [protestant's] intent and the relief sought." *Mattel, Inc.* v. *United States,* 72 Cust. Ct. 257, 262, C.D. 4547, 377 F. Supp. 955, 960 (1974). *See also, e.g., J. Ray McDermott & Co. v. United States,* 69 Cust. Ct. 197, 202, C.D. 4394, 354 F. Supp. 280, 284 (1972), *appeal dismissed,* 60 CCPA 185 (1973).

There is the additional consideration that 19 U.S.C. § 1514(c)(1) permits a party to present new grounds in support of objections raised by a protest at any time prior to the disposition of the protest. Thus, even though the protest initially did not specifically appraise Customs of Old Republic's contention that the liquidation was a nullity due to Customs' failure to notify it of the extension of liquidation, Old Republic did in fact present such grounds in its letters of January 12, 1982 and January 4, 1983. Customs' consideration of these grounds is evinced by its denial of the protest on the basis that the "[e]xtension and liquidation are valid." In short, the Customs determination demonstrates that Old Republic's protest, as supplemented by its two later letters to the agency, conveyed unmistakably the protestant's intent and the relief sought.

For the foregoing reasons, the government's motion to dismiss for lack of jurisdiction is denied.

(Slip Op. 84-81)

KLOCKNER INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 84-3-00388

Before FORD, *Judge.*

[Dismissed.]

(Decided July 6, 1984)

Wayne Jarvis, Ltd., Wayne Jarvis and *Michael G. Hodes,* at the trial and on the brief, for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Kenneth N. Wolf,* at the trial and on the brief), for the defendant.

FORD, *Judge:* This action involves the importation of eleven different types of hot rolled carbon steel sections imported from the Federal Republic of Germany. Eight of these sections are used in the manufacture of rims for wheels of off-highway vehicles. The remaining three types are utilized in the manufacture of hinges for doors of vans and trucks. The merchandise was denied entry since it was accompanied by neither an export certificate issued by the European Coal and Steel Community (ECSC) nor a Special Summary Steel Invoice (SSSI).

The export certificate is required by an "Arrangement", entered into by the ECSC and the United States, which was published in the Federal Register, Vol. 47 p. 49058 *et seq.* The list of so-called "Arrangement Products" set forth *infra* includes, among other products, those subject to classification under Item 609.80(45) of the Tariff Schedules of the United States, which is the classification involved herein. The Special Summary Steel Invoice is required by Customs Regulations, 19 C.F.R. § 141.89(b)(2)(i)(3).

The Tariff Schedules of the United States, Schedule 6, Part 2, provide as follows:

	Angles, shapes, and sections, all the foregoing, of iron or steel, hot rolled, forged, extruded, or drawn, or cold formed or cold finished, whether or not drilled, punched, or otherwise advanced; sheet piling or iron or steel:	
	Angles, shapes, and sections:	
	Hot rolled; or, cold formed and weighing over 0.29 pound per linear foot:	
	Not drilled, not punched, and not otherwise advanced:	
609.80	Other than alloy iron or steel.	0.9% ad val.
	Having a maximum cross-sectional dimension of 3 inches or more:	
	Wide flange shapes or sections:	
	H-piles.....	
	Other.....	
	Other:	

	Angles.....	
	Channels.....	
609.8045	Other.....	
	Angles, shapes, and sections, all the foregoing, of iron or steel, hot rolled, forged, extruded, or drawn, or cold formed or cold finished, whether or not drilled, punched, or otherwise advanced; sheet piling of iron or steel:	
	Angles, shapes, and sections:	
	Hot rolled; or, cold formed and weighing over 0.29 pound per linear foot:	
	Drilled, punched, or otherwise advanced:	
609.8400	Other than alloy iron or steel.	5.5% ad val.

Tariff Schedules of the United States, Schedule 6, Part 2:

Subpart B headnotes:

1. This subpart covers iron and steel, their alloys, and their so-called basic shapes and forms, and in addition covers iron or steel waste and scrap.

* * * * * * *

3. *Forms and Conditions of Iron or Steel.*—For the purpose of this subpart, the following terms have the meaning hereby assigned to them:

* * * * * * *

(j) *Angles, shapes, and sections:* Products which do not conform completely to the respective specifications set forth herein for blooms, billets, slabs, sheet bars, bars, wide rods, plates, sheets, strip, wire, rails, joint bars, or tie plates, and do not include any tubular products.

General Headnotes and Rules of Interpretation, TSUS:

2. *Customs Territory of the United States.* The term "customs territory of the United Sates", as used in the schedules, includes only the States, the District of Columbia, and Puerto Rico.

19 C.F.R. § 141.89(b)(2)(i)(3):

(b) Special Summary Steel Invoice.

(1) A Special Summary Steel Invoice (Customs Form 5520) shall be filed in duplicate at the time of filing the entry summary for each shipment which is determined by the district director to have an aggregate purchase price of $10,000 or over or, if from a contiguous country, of $5,000 or over, including all expenses incident to placing the merchandise in condition packed ready for shipment to the United States, and which contains any of the articles of steel listed in paragraph (b)(2) of this section. In addition to the information required by § 141.86, the

Special Summary Steel Invoice shall set forth the following:

(A) The date price terms were agreed upon (the date of agreement on the final sales price for the shipment).

(B) Description and cost of extras (a description of, and the additional price charged for, extras, other than width and length, with extras described in terms understood in the United States market).

(C) American Iron and Steel Institute (AISI) category.

(D) Base price (the base price for each steel category on which the total sales price was based).

(E) The name of the producer, the importer, and the price paid by the first unrelated purchaser in the United States, if that price is available at the time of filing the entry summary. One or more continuation sheets may be used to supply this information, if necessary.

(2) The following articles of steel are subject to the special invoice requirements of § 141.89(B)(1):

(i) Category Number and Products:

* * * * * * *

(3) Structural Shapes, plain 3 inches and over.

19 U.S.C. Section 81c:

Admission of foreign merchandise into zones without regard to customs laws; treatment; shipment into customs territory; appraisal; reshipment.

Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the customs laws of the United States except as otherwise provided in this Act [19 USCS § 81a et seq.] be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this Act [19 USCS § 81a et seq.], and be exported, destroyed, or sent into customs territory of the United States therefrom in the original package or otherwise; but when foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise.

19 U.S.C. § 1626 provides:

(a) Export validation requirement

In order to monitor and enforce export measures required by a foreign government or customs union, pursuant to an international arrangement with the United States, the Secretary of the Treasury may, upon receipt of a request by the President of the United States and by a foreign government or customs union, require the presentation of a valid export license or other documents issued by such foreign government or customs union as a condition for entry into the United States of steel mill products specified in the request. The Secretary may provide by regulation for the terms and conditions under which

such merchandise attempted to be entered without an accompanying valid export license or other documents may be denied entry into the United States.

(b) Period of applicability

This section applies only to requests received by the Secretary of the Treasury prior to January 1, 1983, and for the duration of the arrangements.

19 U.S.C. § 1626 was added at § 153 to Pub. L. 97-276 on October 2, 1982.

The following information is contained in the "Arrangement", published in the Federal Register, Volume 47, No. 210, October 29, 1982:

Appendix II

The following product definitions are taken from the last published Federal Register notice of a determination in the cases subject to this note of termination.

1. The term *"carbon steel structural shapes"* covers hot-rolled, forged, extruded, or drawn, or cold-formed or cold-finished carbon steel angles, shapes, or sections, not drilled, not punched, and not otherwise advanced, and not conforming completely to the specifications given in the headnotes to Schedule 6, Part 2 of the Tariff Schedules of the United States Annotated ("TSUSA"), for blooms, billets, slabs, sheet bars, bars, wire rods, plates, sheets, strip, wire, rails, joint bars, tie plates, or any tubular products set forth in the TSUSA, having a maximum cross-sectional dimension of 3 inches or more, as currently provided for in items 609.8005, 609.8015, 609.8035, 609.8041, or 609.8045 of the TSUSA. Such products are generally referred to as structural shapes.

Appendix III—Arrangement

* * * * * * *

4. Export Limits. (a) For the period 1st November 1982 to 31 December 1983 (hereinafter called "the Initial Period") and thereafter for each of the years 1984 and 1985 export licenses shall be required for the Arrangement products. Such licenses shall be issued to Community exporters for each product in quantities no greater than the following percentages of the projected U.S. Apparent Consumption (hereinafter called "export ceilings") for the relevant period:

* * * * * * *

(c) For the purposes of this Arrangement the USA shall comprise both the U.S. Customs Territory and U.S. Foreign Trade Zones. In consequence the entry into the U.S. Customs Territory of Arrangement products which have already entered into a Foreign Trade Zone shall not then be again taken into account as imports of Arrangement products.

APPENDIX B—PRODUCT COVERAGE

* * * * * * *

Carbon Steel Structural Shapes
73.11-12,73.11-14, 609.8005,
73.11-16,73.11-19, 609.8015,
73.11-20,73.11-31, 609.8035,
73.11-39,73.63-10, 609.8041,
73.63-29,73.63-50, 609.8045.

Plaintiff, on January 24, 1984, attempted to enter the involved merchandise under Item 609.80(45) TSUS. On January 25, 1984, the entry was rejected and returned, advising plaintiff to supply SSSI's and ECSC export certificates.

Plaintiff's second count in the complaint, relating to classification under 692.3288 TSUS covering parts of motor vehicles, etc., was abandoned at the trial and is, therefore, dismissed.

Subsequently, on January 31, 1984, plaintiff attempted to enter the eight types of carbon steel special rim sections under 609.8400 TSUS, which covers sections of steel hot rolled and otherwise advanced. On February 2, 1984 this entry was rejected for the same reasons, the lack of SSSI's and ECSC export certificates.

Count IV of the complaint covers attempt to enter, on February 3, 1984, the three different types of steel hinge sections into the Foreign Trade Zone. On the 8th of February 1984, the entry was rejected for the same reasons.

The record consists of the testimony of five witnesses called on behalf of plaintiff and one called by defendant. In addition to the numerous exhibits received in evidence for both parties, there was a jointly stipulated exhibit and one unnumbered exhibit. The special steel sections involved herein are manfactured according to customer specifications. Usually the customer supplies a drawing to the manufacturer with specifications set for therein. The manufacturer then prepares an engineering drawing which, if acceptable, is initialed by the customer. An order is then placed for delivery of a section. After an order is received arrangements are made for the production of rolls and roll accessories. The parties stipulated the merchandise weighs over .29 pounds per linear foot.

The special sections are manufactured starting with the heating of blooms to rolling temperature. These are then conveyed to the various stands, at which time the cross section of the bloom is reduced, the length is proportionately increased, and the shape changed to the desired contour. The length at the finishing stand is approximately 50 to 80 meters. The bloom from which it started had a maximum length of seven meters.

After the section has passed the finishing stand, it is transported to the "hot sawing device", where it is cut to the customers desired length. At this point it is transported to a cooling bed to permit the sections to cool down. After cooling down it is transported to the straightening machine which straightens the sections to an 0.25

percent tolerance. The sections are then sent to the piling device to prepare for delivery.

With respect to the rim sections, prior to being readied for shipment they are cut to so-called usage lengths by a shearing machine. These must be cut with a tolerance of plus or minus three millimeters. The rim sections have also been knurled by milling.

The hinge sections, in addition to the foregoing process, require a shaving operation to remove the caliber overfill. This is accomplished on a circular shear and occurs after the straightening operation.

The testimony of the witnesses questioned on the language of structural shapes or structurals agreed the special section involved does not fall within either category.

The manufacture of hinges from the imported special sections by the customer of plaintiff requires numerous operation after importation. A long length of the bar is cut by a punch shearing press to the width desired. It is then subjected to a wheelabrating process, which removes rust and scale from the steel. Thereafter the steel is subjected to notching and piercing. This process, also known as brooching, removes metal and makes the section into a specific configuration. In the restrike operation the item is checked to make sure it is holding the desired configuration. The hinge piece is drilled and subjected to a pickling operation, which removes oil, chips and scale by the use of acid. The hinge is washed, rinsed and zinc phosphate coated to prevent rust.

Rims are manufactured from the imported sections by first placing the steel in a circling machine to form a cylinder. After this operation, since the ends are not in perfect alignment, it is subjected to a shearing operation to correct it. Due to the shearing operation there is a space between the ends which must be pressed together by a press. The rim is then butt welded, with the excess welding being trimmed off by a rotary trimmer. This is done in two operations, one side at a time.

The next operation is called coining, in which pressure is applied between the coin dye and the rim in sufficient force to smooth any imperfections on the rim surface. A grinding operation is then performed to cover any edge area missed by the rotary trimmer operation. The rim is then brought to the shrink machine to remove part of the conical condition. An expanding operation is then utilized to expand the rim and test the weld. A final shrink operation is performed to set the outside diameter within the tolerances as to size and roundness specified by the customer.

Plaintiff's primary contention, Count I of its complaint, is based upon the premise that the imported special sections are properly subject to classification under 609.80(45), as classified, but are not subject to the Arrangement. Accordingly, an export certificate or a Special Summary Steel Invoice would not be required. This theory is based upon the language utilized in Appendix B of the Arrange-

ment under the heading "Description", which sets forth "Carbon Steel Structural Shapes", and then lists NIMEXE number and TSUSA numbers, which includes 609.80(45). Plaintiff contends both the description and the TSUSA number are necessary to embrace the merchandise. In other words, plaintiff contends that carbon steel structural shapes covered by 609.80(45) are Arrangement products, but not the special sections involved herein. Defendant contends all the sections covered by 609.80(45) are Arrangement products.

Congress, in its effort to assist the steel industry of the United States, enacted 19 U.S.C. § 1626 on October 2, 1982. The language of said provision, as indicated *supra*, makes the intent clear. Subsequently, an Arrangement, effective October 29, 1982, was entered into by the United States and the ECSC.

The purposes of the Arrangement are to: (1) permit the ECSC to restructure the European steel industry by progressively eliminating subsidies; (2) permit the domestic steel industry to modernize and change; and (3) create a period of stability in trade in certain steel products between the Community and the USA (47 Fed. Reg. at 49061).

The authority for the Executive Branch of the United States to enter into such arrangement was delegated by the previous enactment of 19 U.S.C. § 1626. Accordingly, any argument of the lack of authority by the Executive Branch to enter into such an agreement is without merit.

The utilization of the terms "carbon steel structural shapes" or "structurals" by the Arrangement does not, in the opinion of the Court, limit Item 609.80(45) to only such items as are commonly or commercially known as those articles.

Examination of the Tariff Schedules of the United States (TSUS) establishes the term "structural shapes" is not contained therein. The term "structural units" is utilized in Items 652.93 to 652.96, but said item numbers are not contained in the Arrangement. In view of the foregoing, the utilization of the terms "structural shapes" or "structurals", standing alone, cannot delineate the scope of the Arrangement Products. Rather, the utilization of the TSUS and NIMEXE (the European Community tariff classification) numbers permits the ECSC and the U.S. Customs Service to define precisely which products are "Arrangement Products" and, therefore, require an export certificate.

In addition, the Arrangement defines what the parties intended to be encompassed by the term "structural shapes." The definition, which includes "Sections", together with Item No. 609.80(45), makes clear the intent of the parties to include merchandise such as involved herein. In view of the definition contained in the Arrangement and the language of 609.80(45), if the Court were to follow the contention of plaintiff and limit such items to those commercially or commonly known as "structural shapes", it would be

contrary to the intent of the negotiating parties to the Arrangement.

Plaintiff further contends the processes utilized after the sections complete the finishing stand (i.e., straightening, cutting, knurling or shaving of the overfill on the hinge sections) constitute advancements and, as such, the sections are subject to duty under Item 609.8400. Under this classification an export certificate and a Special Summary Steel Invoice would not be required.

The record indicates the involved special sections are made to the specifications of the customer and are required to have the above processes performed upon them. The law is well settled that no step in the creation of an article is at the same time an advancement. *United States* v. *Philipp Overseas, Inc.*, 68 CCPA 43, C.A.D. 1263, 651 F.2d 747 (1981); *United States* v. *Baron Tube Co., et al.*, 47 CCPA 69, C.A.D. 730 (1960); *Commercial Shearing & Stamping Co.* v. *United States*, 65 Cust. Ct. 91, C.D. 4060, 317 F. Supp. 750 (1970), aff'd., 59 CCPA 203, C.A.D. 1067, 464 F.2d 1048 (1972).

Notwithstanding the fact the imported special sections were made to specifications, which include the so-called advancement processes, case law has negated these processes as advancements. The mere fact that these processes could have been applied to the sections by the customer, with tools readily available, does not assist in the contention that they constitute advancements.

The process of straightening has been held not to be an advancement. *United States* v. *Philipp Overseas Inc., supra; Avins Industrial Products Co.* v. *United States*, 72 Cust. Ct. 43, C.D. 4503, 376 F. Supp. 879 (1974), *reh. den.*, 72 Cust. Ct. 147, C.D. 4522 (1974), aff'd. 62 CCPA 83, C.A.D. 1150, 515 F.2d 782 (1975).

Additionally, cutting to length or to customer specification has been held not to be an advancement. In *Associated Metals & Minerals Corp.* v. *United States*, 65 Cust. Ct. 586, C.C. 4143 (1975), the Court made the following observation:

> [A]lthough the plates were sheared to size and shape according to specification, we do not regard such shearing as an advancement * * *. Instead, it appears that such shearing was necessary to produce plates which met the size and shape specified by the importer.

Knurling amounts to a deformation of the section and, as such, does not constitute an advancement. In *Commercial Shearing & Stamping Co.* v. *United States, supra,* the Court described the manufacturing process of the merchandise involved and indicated that the use of a press and die causes "metal to plastically deform". The Court therein held the merchandise, which was also subjected to other processes, not to be advanced within the language of Item 609.80, *supra.*

The shaving process to remove the caliber overfill or excrescent material is not considered an advancement within the intent of Schedule 6, Part 2, Headnote 1 or within the holding in *Commer-*

cial Shearing, supra; American Mannex Corp. v. *United States,* 56 Cust. Ct. 31, C.D. 2608 (1966). It is also noted that cutting to length, cooling and straightening were held in *American Mannex* not to be advancements. Accordingly, plaintiff's claim that said merchandise is subject to classification under Item 609.8400 cannot be sustained.

The final argument presented for consideration is whether Customs correctly required ECSC export certificates and Special Steel Summary Invoices for entry of merchandise into the Foreign Trade Zone. Plaintiff contends this requirement by Customs and its refusal to permit entry into the Zone was improper. Plaintiff further contends that Article 4c of the Arrangement is unlawful since it is without statutory authority and contrary to the Foreign Trade Zones Act, 19 U.S.C. § 81a *et seq.*

A plain reading of 19 U.S.C. § 1626 is indicative of the intent of Congress, as noted *supra,* to delegate authority to the Executive Branch in order to monitor steel mill products and enforce export measures required by foreign governments for entry in the United States pursuant to an international agreement. The Arrangement, Article 4c, defines the U.S.A. as comprising "both the U.S. Customs Territory and U.S. Foreign Trade Zones". From this it is clear that Customs acted properly within the language of Article 4c. The underlying question presented, however, is whether there was authority delegated to enter into an agreement which is contrary to a previously enacted statutory provision, 19 U.S.C. § 81a *et seq.*

Plaintiff urges the Court to find Article 4c of the Arrangement, which imposes conditions beyond the scope of 19 U.S.C. § 1626 and in violation of 19 U.S.C. § 81a *et seq.,* invalid. There is no question that ordinarily, and under the provision of the Foreign Trade Zone Act, 19 U.S.C. § 81a *et seq.,* a Foreign Trade Zone is not within the Customs Territory of the United States. However, in interpreting a statute, the Court must give effect to the statutory purpose and legislative intent. *Mount Washington Tanker Company* v. *United States,* 1 CIT 32, 505 F. Supp. 209 (1980), aff'd., 69 CCPA 23, 665 F.2d 340 (1981).

From the language of 19 U.S.C. § 1626 and the record of the Congressional debates preceding its enactment, it seems clear the purpose of said statute is to assist the steel industry of the United States. The intent of the negotiators of the Arrangement was to have the ECSC restructure its steel industry to eliminate state aids and to "restrain exports to or destined for consumption in the U.S.A. of * * * Arrangement products." With these purposes in mind, the language of 4c is in accordance with the intent of the drafters of the statute and the negotiators of the Arrangement. To hold otherwise would defeat the purpose for which § 1626 was enacted. If in the case at bar the merchandise was permitted into the Foreign Trade Zone and there manipulated to the point that it might be considered advanced, it would then be permitted to be entered under Item 609.8400 without the requirement of the special

documentation. While American labor would be utilized in "advancing" the merchandise, this would not assist the steel industry but only that segment of non-mill steel workers who are utilized to perform the work in the Foreign Trade Zone. This was obviously not the intent of Congress in delegating the authority to enter into the Arrangement.

To hold Article 4c of the Arrangement void would, in the opinion of the Court, frustrate the intent of Congress in its attempt to assist the steel industry.

In view of the foregoing, the claims of plaintiff are overruled, and the action is dismissed.

Judgment will be entered accordingly.

Judgment

KLOCKNER INC., PLAINTIFF *vs.* UNITED STATES, DEFENDANT

Court No. 84-3-00388

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED: that the action be and the same hereby is dismissed.

Dated: New York, New York, July 6, 1984.

(Slip Op. 84-82)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL 834, PLAINTIFF, *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

Before: RE, *Chief Judge.*

Court No. 81-6-00762

ON THE COURT'S MOTION FOR REVIEW OF ADMINISTRATIVE DETERMINATION UPON AGENCY RECORD

Local 834, on behalf of its members who were employees at the Heintz plant of the Kelsey-Hayes Company, challenge the Secretary of Labor's denial of certification of eligibility for trade adjustment assistance benefits. Local 834 claims that the Secretary erred in not using a ten year base period for determining the existence of "increases of imports" under section 222 of the Trade Act of 1974. Local 834 also claims that imports of automotive wheels by Kelsey-Hayes and imports of wholly assembled automobiles, which are "like or directly competitive" with the products made at the Heintz

plant, "contributed importantly" to the separation from employment of the Heintz plant workers.

Held: In the absence of a valid reason to consider a different base period for determining "increases of imports," the Secretary's use of only the year immediately preceding the year of separation was not erroneous. Wheel imports by Kelsey-Hayes were *de minimis,* and, therefore, did not "contribute importantly" to the Heintz plant workers' separation from employment. A completely assembled automobile is not "like or directly competitive" with any of its components, such as wheels or body parts, under the terms of section 222 of the Trade Act of 1974. Thus, the Secretary's denial of certification is supported by substantial evidence, and is in accordance with law.

[Judgment for defendant; action dismissed.]

(Decided July 10, 1984)

Harry C. Citrino, Jr., for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; (*Sheila N. Ziff* on the brief), for the defendant.

RE, *Chief Judge:* Plaintiff, on behalf of its members who were employed at the Heintz Division, Philadelphia, Pennsylvania (Heintz) plant of the Kelsey-Hayes Company (Kelsey-Hayes), challenges the Secretary of Labor's denial of certification of eligibility for worker adjustment assistance benefits under the Trade Act of 1974, 19 U.S.C. §§ 2101–2487 (1982). The Secretary determined that plaintiff's petition did not satisfy the eligibility criteria of section 222(3) of the Act, 19 U.S.C. § 2272(3). Specifically, he found that imports of articles "like or directly competitive" with those produced by Kelsey-Hayes did not contribute importantly to the separation from employment of plaintiff's members. 46 Fed. Reg. 17,928–29 (1981).

After a review of the administrative record, and upon consideration of the arguments of the parties, the court holds that the Secretary's denial of certification is supported by substantial evidence, and is in accordance with law.

On July 22, 1980, plaintiff, on behalf of its members, filed a petition with the Secretary for certification of eligibility for trade adjustment assistance benefits. The petition was consolidated with one filed by employees from the Kelsey-Hayes' Romulus, Michigan plant because both groups produced the identical article, automotive wheels. Subsequently, the Secretary commenced an investigation and published a notice of the receipt of plaintiff's petition and of the investigation. 45 Fed. Reg. 58,269–70 (1980).

Section 222 of the Act provides, in pertinent part, that the Secretary shall certify a petitioning group of workers as eligible for trade adjustment assistance benefits if he determines:

> (1) That a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm

have become totally or partially separated, or are threatened to become totally or partially separated,

(2) That sales or production, or both, of such firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

Id.

Plaintiff contended that increased imports of automobiles and automotive parts "contributed importantly" to the decline in sales and production at the Heintz plant, and ultimately to the separation from employment of its members, thereby entitling them to certification.

The Secretary's investigation disclosed that the Heintz plant employees produced automotive component parts for sale to manufacturers of cars and trucks. In particular, they produced wheels and major automotive body parts, such as fenders, doors and hoods, primarily for use as original equipment in the manufacture of new cars and trucks. A small percentage of the total production of wheels and body parts at the Heintz plant was for the replacement or aftermarket.

As to wheels, the Secretary's investigation showed that Kelsey-Hayes produced wheels, identical to those made at the Heintz plant, at some of its other plants located in Canada and Mexico, as well as, the United States. The production from the Canadian and Mexican plants was dedicated primarily to sales in markets other than the United States. Imports by Kelsey-Hayes amounted to a relatively small proportion of its total domestic production of wheels during the period January 1978 through May 1980.

The Secretary's investigation further disclosed that, each year from 1975 through 1978, domestic production of wheels for motor vehicles increased in value, with a 3.4% increase from 1977 to 1978. From 1978 to 1979, however, production of wheels decreased in value by 9.9%.

The investigation also revealed that imports of automotive wheels increased in value each year from 1975 through 1978. Yet, from 1978 to 1979, imports decreased in value by 12.1%. Moreover, during the first three quarters of 1980, wheel imports continued to decrease in value. Indeed, imports decreased by 35.4% compared to the same period in 1979.

As part of his investigation, to determine the level of imports of wheels and major body parts during the period under investigation, the Secretary conducted a survey of those customers of Kelsey-Hayes who accounted for the majority of sales from the Heintz plant. The survey revealed that these customers increased purchases of wheels from both domestic and foreign sources in model year 1980 as compared to model year 1979, and projected decreased

purchases from both sources in model year 1981 compared to 1980. The survey also indicated that, as to total purchases, customer reliance on imports remained virtually unchanged during the January 1978 to May 1980 period.

As to major automotive body parts, the Secretary's investigation revealed that imports of these component parts were negligible during the period under investigation. The Secretary's customer survey confirmed this finding, and evidenced a strong preference among the automobile manufacturers for domestic sources for body parts because of their close geographical proximity to the car and truck assembly plants. Since automotive body parts must be made according to specifications for each make and model vehicle, the automobile manufavturers have found it easier to monitor and test the accuracy and quality of the components by using domestic suppliers of parts. The American automobile manufacturers also indicated that they found it economically advantageous to buy parts from domestic sources because the shipping charges made it cost prohibitive to import the identical parts from foreign manufacturers.

Based on these findings, the Secretary concluded that plaintiff's petition failed to satisfy the third criterion of section 222, stating that "with respect to wheels, a survey of customers indicated that increased imports did not 'contribute importantly' to worker separations at the firm. With respect to [major body components, such as] hoods, fenders and doors, United States imports are negligible." Hence, on March 20, 1981, the Secretary issued a negative determination on the petition. 46 Fed. Reg. 17,928–29 (1981).

Plaintiff then sought administrative reconsideration, claiming that the Secretary erred on two grounds in his interpretation of the "contributed importantly" criterion found in section 222(3). First, plaintiff maintained that increased imports of wheels, previously manufactured in the United States, and now produced by Kelsey-Hayes in Canada and Mexico, resulted in a reduced demand for the wheels produced at the Heintz plant, and the subsequent separation of the workers. Second, plaintiff claimed that increased imports of wholly assembled cars caused a down-turn in sales of one of Kelsey-Hayes' primary customers, General Motors, which resulted in a reduced demand for Kelsey-Hayes' wheels and body components, and led to the separation from employment of plaintiff's members.

The Secretary, in a letter dated April 17, 1981, dismissed plaintiff's application for reconsideration, and explained that, while it is true that Kelsey-Hayes imported wheels, the amount imported represented a very small proportion of its total domestic production. Moreover, the Secretary found that the trend in company imports from its Canadian and Mexican plants paralleled the production of wheels at the Heintz plant, that is, production increased in 1979 and decreased in 1980. The record further showed that Kelsey-

Hayes imported fewer wheels from those foreign plants in 1980 as compared to 1979. Under these circumstances, the Secretary concluded that imports from Canada and Mexico could not have "contributed importantly" to the separation from employment of the workers at the Heintz plant.

The Secretary also rejected plaintiff's interpretation of the "contributed importantly" standard, stating that plaintiff's use of a fully-assembled automobile as the basis of comparison for determining the existence of import injury was improper. The Secretary noted that, in a pure economic sense, workers producing components, such as wheels, "may be severely impacted" by increased imports of a finished article, namely, an automobile. Nevertheless, in making his determination on certification, the Secretary stated that he was constrained by the statute to compare only those articles "like or directly competitive" with the article under investigation, and cannot consider those products which incorporate the subject article as a component part. Plaintiff, thereafter, commenced this action seeking judical review of the Secretary's negative determination.

The Trade Act of 1974 empowers the court to review a decision by the Secretary which denies a petition for certification of eligibility for trade adjustment assistance benefits to assure that the determination is supported by substantial evidence contained in the administrative record, and is in accordance with law. Trade Act of 1974, § 284(b), 19 U.S.C. § 2395(b) (1982).

Plaintiff advances several arguments for the reversal of the Secretary's negative determination. Initially, plaintiff, citing *Paden* v. *United States Department of Labor,* 562 F.2d 470, 475 (7th Cir. 1977) and *International Union, United Auto, Aerospace and Agricultural Implement Workers* v. *Marshall,* 627 F.2d 559, 562 (D.C. Cir. 1980), contends that the Heintz plant qualifies as an individual plant, as contemplated by the Act, and is therefore, an "appropriate subdivision" which fully satisfies the statutory criteria for certification.

A review of the briefs of the parties indicates that the parties are not in dispute as to whether the Heintz plant is an "appropriate subdivision" for the purposes of certification under section 222(3) of the Trade Act of 1974. The fact that the Heintz plant is an "appropriate subdivision" does not, in and of itself, automatically render plaintiff's members certifiable as eligible for trade adjustment assistance benefits. Section 222 also requires that plaintiff's petition satisfy each of the criteria necessary for certification, including whether increased imports of articles "like or directly competitive" with the articles produced by the Heintz plant workers "contributed importantly" to their separation from employment.

As to these other requirements of section 222, plaintiff claims that the Secretary's findings regarding a decrease in sales, production, and imports of motor vehicles and automotive component parts, do not reflect a true picture of the wheel and automotive

body parts' industries. In particular, plaintiff contends that the Secretary erred in utilizing a one year base period for comparison in making his certification determination. Plaintiff argues that, rather than using, as the basis of comparison, the year immediately preceding the Heintz plant employees' separation, the Secretary should have used a ten year period encompassing 1973 through 1983. Specifically, plaintiff urges that the court require the Secretary to gather data on the total number of vehicles produced and sold in the United States prior to 1973, and compare that data with the total number of vehicles, foreign and domestic, sold in the United States from 1973 through 1983. Plaintiff maintains that the use of a ten year base period will permit a more realistic assessment of the impact of increased automobile imports upon the automobile manufacturers, and those companies which supply them with component parts.

What constitutes an appropriate base period was examined previously in the *Paden* case. In *Paden,* the Secretary compared import levels in the year of separation with import levels in the immediately preceding year to determine the existence of "increases of imports," as contemplated by section 222. In *Paden,* the plaintiff contended that further comparisons should be made, such as a comparison of the year of separation with prior years, and a comparison between prior years. The Secretary contended that confining consideration to imports during the year of separation and the immediately preceding year allowed him to focus on those imports which were most likely to affect employment in the year of separation. This, the Secretary maintained, diminished the effect of those factors which, while affecting employment, were not intended as being within the coverage of the Act. In affirming the Secretary, the Court of Appeals for the Seventh Circuit held that, in the absence of a valid reason to consider a different base period, the use of only the year preceding the year of separation, as the base period for determining "increases of imports," was not erroneous. *Paden* at 474.

Similarly, in this case, the Secretary confined his investigation to the year of separation, 1980, and the prior year, 1979, in order to assess more accurately the injury to the domestic workers, such as those at the Heintz plant, as a result of increases of imports. Plaintiff, however, has not submitted a persuasive argument for this Court to consider a base period other than the one utilized by the Secretary. Therefore, as indicated in *Paden,* plaintiff's claim cannot be sustained.

Plaintiff next contends that, while overall demand for new automotive component parts remained constant or increased, Kelsey-Hayes had parts, identical to those produced at the Heintz plant, manufactured at its Canadian and Mexican plants which were imported into the United States. This, plaintiff asserts, resulted in a reduced demand for the automotive parts produced at the Heintz

plant, which in turn, was an important cause in the workers' separation from employment.

Under section 222 of the Act, the Secretary is empowered to determine if sales or production, or both, and employment declined at the firm being investigated. If they did, he also must determine whether the decline was caused by increased imports of goods "like or directly competitive" with those produced by the firm.

In reviewing the administrative record, the court finds that overall imports of wheels for new cars and trucks decreased in value both absolutely, and in relation to domestic production in 1979 compared to 1978, and continued to decline absolutely during the first 9 months of 1980 compared to the same period in 1979. As to Kelsey-Hayes, wheel imports from its Canadian and Mexican plants were *de minimis* compared to its total domestic production during the period covering January 1978 through May 1980. Moreover, the increase in the value of those wheels imported by Kelsey-Hayes from its foreign plants accounted for only 2.9% of the sales decline experienced by the Heintz plant during the first 5 months of 1980 compared to the same period in 1979. As to the comparison between 1979 and 1978, the record shows an upward trend in total domestic sales of wheels by Kelsey-Hayes both in quantity and value. In short, wheel imports from Kelsey-Hayes' foreign plants mirrored the company's domestic output, increasing in 1979 and decreasing in 1980. Under these circumstances, the court concludes that increased imports by Kelsey-Hayes from Canada and Mexico could not have "contributed importantly" to the Heintz plant workers' separation from employment.

Regarding the production of major body parts, such as hoods, fenders an doors, at the Heintz plant, the record reveals that imports of these products were negligible during the period under investigation. Industry sources indicated that the primary reason for the minimal amount of imports was the prohibitive cost of shipping these parts from foreign suppliers to the automobile assembly plants in the United States.

On the basis of the foregoing, it is clear that there were no increases of either imported wheels or major automotive body parts like or directly competitive with the articles produced by the workers at the Heintz plant which contributed importantly to their separation from employment, and to Heintz' decline in sales or production within the meaning of section 222(3) of the Trade Act of 1974. Indeed, plaintiff has offered nothing more than mere allegations to substantiate its position. These unsubstantiated assertions are wholly insufficient to sustain a finding by the Secretary that would justify the certification of plaintiff's members.

Plaintiff's final contention is that the Secretary erred in not using an automobile as the article of comparison to determine import injury, and the cause of the separation of the Heintz plant workers. Whether an end product is like or directly competitive

with one of its component parts, so as to permit certification of eligibility for trade adjustment assistance benefits, has been considered on several occasions by the Court of Appeals for the District of Columbia, as well as this Court. *See United Shoe Workers* v. *Bedell,* 506 F.2d 174, 179 (D.C. Cir. 1974); *Machine Printers and Engravers Ass'n* v. *Marshall,* 595 F.2d 860, 862 (D.C. Cir. 1979); *Morristown Magnavox Former Employees* v. *Marshall,* 671 F.2d 194, 197 (D.C. Cir. 1982); *Gropper* v. *Donovan,* 6 Ct. Int'l Trade —, No. 81-8-01066, slip op. at 8 (Aug. 16, 1983); *ACTWU, Local 1627* v. *Donovan,* 7 Ct. Int'l Trade —, No. 82-3-00400, slip op. at 10 (Apr. 19, 1984); *Holloway* v. *Donovan,* 7 Ct. Int'l Trade —, No. 81-6-00749, slip op. at 7 (Apr. 25, 1984).

Under this line of cases, the test is clear: the imported article, which allegedly injured the domestic market, "must be found to be 'interchangeable with or substitutable for' the article under investigation." *Holloway,* slip op. at 7 (quoting *Machine Printers and Engravers Ass'n,* 595 F.2d at 862). Based on this test, a component, which is adversely impacted by increased imports of a finished article incorporating that component, cannot be like or directly competitive with the finished product. *Bedell, supra* at 177-78.

This is particularly true in the cases which pertain to automobiles and automotive components. Both *ACTWU, Local 1627* and *Holloway* examined whether an imported automobile was "like or directly competitive" with a component part incorporated into a domestically manufactured automobile so as to render the subject workers certifiable as eligible for trade adjustment assistance benefits. In *ACTWU, Local 1627,* the comparison was between an automobile and automotive lead acid batteries, and in *Holloway,* between a car and injection molded plastic parts, such as bumper guards.

After a review of the applicable case law, in both *ACTWU, Local 1627* and *Holloway,* this Court concluded that the component part in question was neither interchangeable with nor substitutable for the finished product, an automobile. The Secretary's determinations were, therefore, affirmed since the subject workers were not certifiable under section 222 of the Trade Act of 1974.

In the present action, while the articles under investigation, wheels and major automotive body parts, are essential to the production of an automobile, it is apparent that they are neither interchangeable with nor substitutable for an automobile. Hence, plaintiff's claim that the Secretary erred in his interpretation and application of the "like or directly competitive" requirement of section 222(3), is not sustainable.

In view of the foregoing, it is the determination of this Court that the Secretary of Labor's denial of certification is supported by substantial evidence, and in accordance with law. Accordingly, the Secretary's determination is affirmed, and plaintiff's action is dismissed.

Dated: New York, New York, July 10, 1984.

JUDGMENT

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL 834, PLAINTIFF *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

Court No. 81-6-00762

EDWARD D. RE, *Chief Judge.*

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED: that the determination of the Secretary of Labor is affirmed; and it is further

ORDERED, ADJUDGED, and DECREED: that this action be and the same hereby is dismissed.

Dated at New York, N.Y., July 10, 1984.

(Slip Op. 84-83)

AMERICAN SPRING WIRE CORPORATION, ARMCO INC., BETHLEHEM STEEL CORPORATION, FLORIDA WIRE & CABLE COMPANY, AND SHINKO WIRE AMERICA, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, TREFILERIES ET CABLERIES CHIERS CHATILLON GORCY and COMPANHIA SIDERURGICA BELGO-MINEIRA, INTERVENORS

Consolidated Court Nos. 82-10-01355, 83-1-00101, 83-3-00371, 83-3-00455

(Dated July 11, 1984)

Before MALETZ, *Senior Judge.*

OPINION AND ORDER

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, Paul W. Jameson,* and *Kathleen T. Weaver* on the briefs) for plaintiffs.

Michael H. Stein, General Counsel, U.S. International Trade Commission; *Michael P. Mabile,* Assistant General Counsel, U.S. International Trade Commission (*Jack M. Simmons, III* on the brief) for defendant.

Fox Glynn & Melamed (*Raymond F. Steckel* and *Garry P. McCormack* on the brief) for intervenor Trefileries et Cableries Chiers Chatillon Gorcy.

Wald, Harkrader & Ross (*Christopher Dunn* and *William J. Clinton* on the briefs) for intervenor Companhia Siderurgica Belgo-Mineira.

MALETZ, *Senior Judge:* Plaintiffs in this consolidated action represent the domestic prestressed concrete steel wire strand (PC strand) industry.[1] By motion for judgment upon the agency record,

[1] Intervenor Trefileries et Cableries Chiers Chatillon Gorcy is a French producer of PC strand. Intervenor Companhia Siderurgica Belgo-Mineira is a Brazilian producer of PC strand. PC strand is a product consisting of one center wire and six helically placed outer wires that is used in prestressing concrete.

they challenge as unsupported by substantial evidence and otherwise not in accordance with the law four final negative injury determinations by the United States International Trade Commission (ITC or Commission) involving imports of PC strand from Spain, France, the United Kingdom, and Brazil. *See* USITC Pubs. 1281 (Aug. 1982) (Spain); 1325 (Dec. 1982) (France); 1343 (Feb. 1983) (United Kingdom); 1358 (Mar. 1983) (Brazil).[2]

These ITC negative injury determinations followed affirmative findings by the International Trade Administration of the Department of Commerce (ITA) that PC strand imports from Spain, France and Brazil were being subsidized, while such imports from the United Kingdom were being sold at less than fair value. *See* 47 Fed. Reg. 28,723 (1982) (Spain); 47 Fed. Reg. 47,031 (1982) (France); 48 Fed. Reg. 4516 (1983) (Brazil); 47 Fed. Reg. 56,690 (1982) (United Kingdom).

Complaints were timely filed for each of the four ITC determinations. In view of the commonality of issues among the four cases, the actions were consolidated. For the reasons that follow, the court concludes that there is substantial evidence in the administrative record supporting the ITC's negative injury determinations and these determinations are accordingly sustained.

I. Substantial Evidence

Under the statute, a final negative injury determination by the ITC must be sustained unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). "[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 477 (1951), *quoted in Penntech Papers, Inc.* v. *NLRB,* 706 F.2d 18, 22 (1st Cir.), *cert. denied,* 104 S. Ct. 237 (1983). *Accord Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607, 619–20 (1966). Taking into account " 'whatever in the record fairly detracts' from the [agency's] fact finding as well as evidence that supports it, *Penntech, supra,* 706 F.2d at 22 (quoting *Universal Camera, supra,* 340 U.S. at 487–88), "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.* * * *' " *Id.* at 22–23 (quoting *Universal Camera, supra,* 340 U.S. at 488).

The standard of review is identical when this court reviews determinations by the ITC:

> The negative determination by the Commission's majority must be sustained if its findings and conclusions have a ration-

[2] Citations here and hereafter are to the official ITC publications, because *Federal Register* reprints of ITC determinations are generally incomplete.

> al connection to its determination, and are supported by substantial evidence. Fundamentally, in reviewing an injury determination under the Antidumping Act, this Court may not weigh the evidence concerning specific factual findings, nor may the Court substitute its judgment for that of the Commission.

Sprague Elec. Co. v. *United States,* 2 CIT 302, 310–11, 529 F. Supp. 676, 682–83 (1981).[3] *Accord Pasco Terminals, Inc.* v. *United States,* 68 CCPA 8, C.A.D. 1256, 634 F.2d 610 (1980); *Budd Co. Ry. Div.* v. *United States,* 1 CIT 67, 507 F. Supp. 997 (1980).

II. Material Injury

In its final antidumping and countervailing duty investigations, the ITC is required to determine whether:

> (A) an industry in the United States—
> (i) is materially injured, or
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise with respect to which the administering authority [ITA] has made an affirmative determination. * * *

19 U.S.C. §§ 1671d(b)(1) and 1673d(b)(1) (1982).[4] The Commission must make an affirmative finding only when it finds *both* (1) present material injury (or threat to or retardation of the establishment of an industry) *and* (2) that the material injury is "by reason of" the subject imports. Relief may not be granted when the domestic industry is suffering material injury but not by reason of unfairly traded imports. Nor may relief be granted when there is no material injury, regardless of the presence of dumped or subsidized imports of the product under investigation. In the latter circumstance, the presence of dumped or subsidized imports is irrelevant, because only one of the two necessary criteria has been met, and any analysis of causation of injury would thus be superfluous.

"Material injury" has been defined by Congress as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982). Congress has directed the ITC to consider "all relevant economic factors which have a bearing on the state of the industry," *id.* § 1677(7)(C)(iii), including, but not limited to:

> (I) Actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (II) Factors affecting domestic prices, and

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[3] The *Sprague* standard is equally applicable to countervailing duty cases.

[4] The issue of material retardation of the establishment of an industry in the United States is not before the court.

(III) Actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

Id.

The list is illustrative, but not exclusive. The flexibility afforded to the ITC is evinced by the legislative history. *See* H.R. Rep. 317, 96th Cong., 1st Sess. 46 (1979) ("The significance of the various factors affecting an industry will depend upon the facts of each particular case. Neither the presence nor the absence of any factor listed in the bill can necessarily give decisive guidance with respect to an injury determination.") *Cf.* S. Rep. 249, 96th Cong., 1st Sess. 88, *reprinted in* 1979 U.S. Code Cong. & Ad. News 474 ("[T]he significance to be assigned to a particular factor is for the ITC to decide."). No factor, standing alone, triggers a *per se* rule of material injury. *See SCM Corp.* v. *United States,* 4 CIT 7, 544 F. Supp. 194 (1982).

III. ITC Findings Regarding the PC Strand Industry

Against this background, the ITC found, in essence, in each of the four investigations, that the domestic PC strand industry was not suffering material injury or threatened with material injury. While the Commission did not make explicit ultimate finding to this effect, there can be no doubt that this was the thrust of each of its determinations. The agency's path in this regard is clearly discernible. *See Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 286 (1974); *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 595 (1945). Thus, in the Brazil investigation, the Commission found:

> As we have observed in the other recent PC strand investigations, many of the important economic factors which the Commission considers indicate that the condition of the U.S. industry is generally healthy. Domestic production increased steadily and significantly from 1979 through 1981, although the period January-September 1982 showed some decline when compared to the same period in 1981. U.S. producers' shipments of PC strand followed the same general trend. U.S. productive capacity increased throughout the period under consideration, including a very marked increase in the January-September 1982 period compared to the corresponding period in 1981. Two domestic producers recently increased their productive capacity significantly. Notwithstanding the increased capacity of the domestic producers, domestic capacity utilization remained at relatively high levels throughout the entire period, falling only during the first nine months of 1982. Almost all of the recent decline in domestic capacity utilization is accounted for by the increased domestic productive capacity.
>
> Employment, when measured by the number of production and related workers and by hours worked, showed no significant changes during the period 1979 through September 1982,

> although some decline is evident during the first nine months of 1982 compared to the first nine months of 1981. Hourly wages, total compensation, and worker productivity have all increased substantially.
>
> The only significant negative trend in this industry is that of profitability. Although the industry's net sales increased from 1979 to 1981, net profits declined and net losses occurred during the first nine months of 1982. In this investigation, we do not believe that the profitability data, standing alone, are sufficient, when all other factors are considered, to support a finding of material injury or threat of material injury.

USITC Pub. 1358, at 4-6 (Mar. 1983) (footnotes omitted). The Commission made virtually identical findings in the other three investigations. *See* USITC Pubs. 1343, at 4-6 (Feb. 1983) (United Kingdom); 1325, at 4-6 (Dec. 1982) (France); 1281, at 4-6 (Aug. 1982) (Spain).

IV. Evidence in the Record Regarding Material Injury

A. Economic Factors

Examination of the record of the four investigations demonstrates that there is substantial evidence to support the finding that the domestic PC strand industry was not suffering material injury.[5] For the record shows the following:

Market demand for PC strand remained relatively constant during the periods of the investigations. It was not seriously affected by the recession or other forces that had an adverse impact on other segments of the steel industry. Indeed, the domestic industry expanded vigorously throughout the periods covered by the investigations—an expansion that appears to have resulted in part from a 1978 antidumping order issued against PC strand from Japan. 45 Fed. Reg. 57,599. Three producers entered the market in 1980, and domestic productive capacity was substantially greater for the first nine months of 1982 than it was for the whole of 1979.

Moreover, domestic strand production and shipments increased markedly in the period from 1979 to 1981, although they declined slightly in 1982. Capacity utilization too rose steadily after the 1978 antidumping order against Japan, even in the face of the major increases in productive capacity. That is, domestic producers' shipments grew even faster than their productive capacity. In addition, employment in the domestic industry was steady and actually increased through 1981, though it fell slightly in 1982.

Net sales figures likewise increased throughout the period under investigation, although they showed some decline during 1982. Do-

[5] In these four proceedings, the period of investigation covered 1979 through the first quarter of 1982 for Spain, 1979 through the second quarter of 1982 for France, and 1979 through the third quarter of 1982 for the United Kingdom and Brazil. Plaintiffs contend that the alleged injury to the domestic industry was becoming more severe during 1982. But if the Commission had substantial evidence to find no material injury in the Brazil investigation, it would be clearly justified in finding no material injury in the earlier investigations on Spain and France.

mestic producers were not required to warehouse excessive production, with inventory levels remaining virtually constant throughout the period of the investigations, increasing slightly only during 1982.

The domestic industry had no trouble raising capital, as demonstrated by its capital expenditures for new plants and equipment and by its interest expenses for working capital and new capital investments. What is more, the domestic producers have grown rapidly and gained an ever-increasing share of the domestic market.

In fact, the record reveals only one negative factor—lack of profitability during 1982. Looking at the industry as a whole, however, it had a net profit in every year except 1982, and the loss it experienced in the first nine months of 1982 was not significant in proportion to net sales. Moreover, if operating profit is considered, the domestic industry was profitable in every year. The loss in 1982, therefore, was accounted for by nonoperating expenses, which appear related to the domestic industry's large increase in capacity during 1982. Given this capacity increase—with its attendant capital costs and diseconomies of scale while the capacity came on stream—the performance of the domestic industry appeared extremely strong.

Plaintiffs, however, contend that the losses suffered by the domestic industry during the last nine months of 1982 preclude any finding that the industry is healthy and mandate a finding of material injury. But profitability is only one of the factors to be considered by the ITC. This does not denigrate its importance to the Commission's analysis of material injury, but it does underscore the legislative intent that absence of profits shall not act as a proxy for injury. Whatever the importance of a particular factor, the ITC is obligated "to consider and weigh a number of other pertinent economic and financial criteria, and consider all the facts and circumstances, including the health of the domestic industry." *SCM Corp. v. United States,* 4 CIT 7, 13, 544 F. Supp. 194, 199 (1982) (affirming ITC's determination that, in light of other economic factors, significant market penetration by imports, standing alone, was insufficient basis for finding of injury). *See Armstrong Bros. Tool Co. v. United States,* 84 Cust. Ct. 16, 28, C.D. 4838, 483 F. Supp. 312, 322, *aff'd,* 67 CCPA 94, C.A.D. 1252, 626 F. 2d 168 (1980).

Under the circumstances, substantial evidence supported the Commission's conclusion that the industry was not suffering material injury, notwithstanding the loss it suffered in 1982—a loss that was not unusual considering the industry's rapid expansion in that period. It was thus reasonable for the ITC to find that the loss was insufficient to outweigh other significant economic factors, including increased productive capacity, increased shipments, and all the other indicia of a healthy industry.[6]

[6] Plaintiffs further argue that the Commission failed to consider the bankruptcy in August 1982 of Pan American Ropes "as an indicator of the material injury suffered by the domestic industry." The argument lacks

Continued

B. Time Frame of ITC Analysis

In addition to criticizing the weight given by the ITC to various economic factors, plaintiffs challenge the timeframe used in the agency's analysis of the industry. They allege that the ITC "should have conducted its review on a quarterly basis, rather than a calendar year basis, in its material injury investigation," and that it should have concentrated on the most recent quarters, *i.e.,* the first three quarters of 1982.

But the ITC is not required by statute to use any particular time frame for its analysis, although it generally focuses on annual time periods. At best, plaintiffs can point to excerpts from the legislative history indicating that data *may* be considered on a quarterly basis. *See* H.R. Rep. No. 317, 96th Cong., 1st Sess. 47–48 (1979) (quarterly analysis of increases in market penetration is appropriate in some investigations of *threat* of material injury). This is hardly a mandate for quarterly analysis on demand of petitioners.

Plaintiffs have failed to demonstrate that the ITC's use of its standard annual analysis constituted error. Plaintiffs' preference for quarterly analysis (with the accent on more recent quarters) is based, apparently, on a decline in certain trends toward the close of the time period analyzed by the ITC. However, it was reasonable for the ITC to rely on its customary annual analysis since the investigations showed considerable fluctuation in quarter-by-quarter data, analysis of which would distort significant longer term trends. For example, just as limiting examination to quarters in 1980 would have produced an erroneously optimistic picture of the industry, concentration on corresponding quarters in 1982, as urged by plaintiffs, would have exaggerated negative indicia of the industry's condition.

C. Reconstituted Industry

Plaintiffs further argue that the industry was "reconsituted" following the 1978 antidumping order on Japanese strand. In their view, the "reconstruction" was completed in the first quarter of 1981 and the Commission should have used the period of time following that quarter as the base for measuring the performance of the domestic industry, rather than using as a base the year 1979, when the industry was allegedly recovering from the deleterious effects of dumped Japanese imports.

Plaintiffs' "reconstituted industry" argument rests on the theory that the industry was changed radically by the 1978 antidumping order against Japan, which led, plaintiffs say, to the increases in domestic capacity and production found by the ITC. According to plaintiffs, the rising indicators betokened domestic industry retaking its rightful position in the market rather than staking out new ground.

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merit. The record showed that Pan American Ropes was a producer of a variety of wire products and only a marginal and recent producer of PC strand. Considering its minimal role in the PC strand industry, its demise is inconsequential to the overall performance of the industry.

Nevertheless, the domestic industry that existed before 1978 is basically the same industry that exists today. Plaintiffs have failed to show how either the entry of new firms or the industry's growth changed the nature of that industry. Nor have they shown how such changes could or should make a difference in the Commission's analysis under the law.

Moreover, even assuming that the industry was "reconstituted" in 1979, that alone is significant support for the Commission's finding of no material injury. It indicates that large producers saw a sufficient likelihood of long term profitability to enter into the United States market in a major way, despite the obvious short term losses that the commencement of operations would entail.[7]

V. Threat of Material Injury

Where the ITA has found subsidies or dumping, the ITC is required to determine whether a domestic industry has been materially injured or *threatened* with material injury. 19 U.S.C. §§ 1671d(b)(1)(A) and 1673d(b)(1)(A) (1982). Having held that substantial evidence in the administrative record supports the ITC determination that the domestic PC strand industry has not been materially injured, the court now turns to the question of threat of material injury.

In each of its four investigations, the ITC determined that the domestic PC strand industry was not threatened with material injury by the subject imports. In this regard, plaintiffs challenge only the Spanish determination. They argue that Spanish capacity to produce strand is increasing and that this will result in increased strand exports to the United States.

The difficulty with this argument is that the mere fact of increased capacity does not *ipso facto* imply increased exports to the United States. The information of record, in fact, is that there would be no such significant increase. Thus, the sole U.S. importer of Spanish strand estimated only a minor increase in imports from 1981 to 1982—and from the record, there was no reason to doubt his assessment of the market. This information is significant because it evidences the intentions of the importer, and when forecasting future import levels, intentions are "a proper * * * element." *Matsushita Elec. Indus. Co.* v. *United States*, 6 CIT —, —, Slip Op. 83-69, 569 F.Supp. 853, 857, *motion for rehearing denied*, 6 CIT —, Slip Op. 83-102, 573 F.Supp. 122 (1983). A Commission finding that levels of imports will increase must be based on "positive evidence tending to show an intention to increase the levels of im-

[7] Plaintiffs also argue that in the Spain, France, and Brazil investigations, the Commission illegally conducted a regional industry investigation, looking only at Florida and Texas and thus concluding that the domestic industry was not injured because producers in these two states were healthy. There is no merit to the argument. The fact is that in each of these investigations the ITC considered the condition of the *entire* industry. Indeed, virtually all the data submitted to the Commission—including data on profitability, production, capacity utilization, and productivity—were industry-wide data. It was this information that the Commission discussed in its written opinions and on which it relied to find the industry not injured.

portation." *Id.* The mere existence of increased Spanish capacity to produce strand—the only information cited by plaintiffs—is not such "positive evidence."

In further support of their contention of threat of material injury, plaintiffs take Spanish import data for the first four months of 1982 and conclude that full-year 1982 import data would be three times greater. This argument ignores the record. As stated by the Commission, there is no indication that the accumulation by the U.S. importer of inventories of Spanish strand was "related to any cause other than the vagaries of ocean transportation. * * *" USITC Pub. 1281, at 11. Ocean transport, the Commission noted, is erratic, and "[s]ometimes orders placed several months apart will arrive in the United States at the same time." *Id.* at A-13. These statements are borne out of quarterly import statistics. Given these considerations, the ITC had ample reason to find that the import figures for January through April 1982 did not evidence a trend of increasing imports.[8]

Therefore, there is substantial evidence that imports were not increasing and that there was no intent to increase such imports. Accordingly, the ITC's conclusion that there was no threat of material injury by reason of strand imports from Spain is sustained.

ORDER

For the foregoing reasons, plaintiffs' motion for judgment on the agency record is denied and the negative injury determinations of the ITC are affirmed.[9]

(Slip Op. 84-84)

REPUBLIC STEEL CORPORATION, UNITED STATES STEEL CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES OF AMERICA AND UNITED STATES INTERNATIONAL TRADE COMMISSION, DEFENDANTS and COMPANHIA SIDERURGICA PAULISTA (COSIPA), ET AL., POHANG IRON AND STEEL CO. LTD., ET AL., DEFENDANT-INTERVENORS

Before WATSON, *Judge.*

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[8] In the last analysis, plaintiffs' contention that Spanish imports would tend to increase and thus would threaten material injury to the domestic industry is based on speculation. But, for purposes of a finding of threat of injury, more than speculation is required. "An ITC affirmative determination with respect to threat of material injury must be based upon information showing that the threat is real and injury is imminent, not a mere supposition of conjecture." S. Rep. No. 249, 96th Cong., 1st Sess. 88-89, *reprinted in* 1979 U.S. Code Cong. & Ad. News 474-75. *Accord* H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979). *See also Alberta Gas Chems., Inc.* v. *United States*, 1 CIT 312, 324-25, 515 F. Supp. 780, 791 (1981).

[9] As indicated previously, an affirmative injury finding requires *both* (1) that the domestic industry be materially injured (or threatened with material injury), and (2) that such injury be by reason of the unfairly traded imports. Since the court has concluded that there is substantial evidence to support the Commission's conclusion that the domestic industry was not materially injured or threatened with material injury, such findings are dispositive of this litigation. Hence, the court does not reach the other issues raised by plaintiffs, *i.e.*, that the Commission (1) erred in failing to cumulate the injurious effects of imports from the four countries under investigation, and (2) erroneously determined that even assuming *arguendo* the existence of material injury, such injury was not caused by the subject imports.

Consolidated Court No. 82-03-00372

REASONABLE INDICATION OF INJURY OR THREAT OF INJURY

The Court reviews seven preliminary determinations by the International Trade Commission that there were no reasonable indications of injury or threats of injury from importations of certain steel products from individual countries.

The preliminary determinations are found not to be in accordance with the law, for failing to consider the cumulative effect of importations of competitive products from more than one country, or for applying an erroneous or excessively stringent standard for the making of the determinations.

The Court discusses the cumulation of importations, the standards for the making of a preliminary determination of whether there is a reasonable indication of injury or threat of injury, and analyzes the relevant statutory provisions.

The matter is remanded to the ITC with instructions.

(Decided July 11, 1984)

Cravath, Swaine & Moore (Alan J. Hruska of counsel) for plaintiffs Republic Steel Corp., Inland Steel Company, Jones & Laughlin Steel Inc., National Steel Corp., and Cyclops Corporation.

Law Department of United States Steel Corporation (D.B. King, J.J. Mangan, C.D. Mallick, L. Ranney and *P.J. Koenig* of counsel) for plaintiff United States Steel Corporation.

Office of the General Counsel, International Trade Commission *(Michael H. Stein,* General Counsel; *Michael P. Mabile,* Assistant General Counsel; *Catherine R. Field,* Attorney) for the federal defendants.

Wald, Harkrader & Ross (Christopher Dunn and *Vaughan Finn* of counsel) for defendant-intervenors COSIPA and USIMINAS.

Daniels, Houlihan & Palmeter (N. David Palmeter, Daniel Cameron and *Miriam Cutler* of counsel) for defendant-intervenors Pohang Iron and Steel Co., Ltd., and Union Steel Mfg. Co., Ltd.

Bredhoff & Kaiser (George H. Cohen, Robert M. Weinberg and *A. Richard Feldman* of counsel) and *Carl B. Frankel,* Associate General Counsel, United Steelworkers of America, for *amicus curiae* United Steelworkers of America, AFL-CIO-CLC.

WATSON, *Judge:* This consolidated judicial review involves seven instances in which countervailing duty investigations of imported steel products came to an end because the International Trade Commission (ITC) found that there was no reasonable indication of material injury or threat of material injury from importations of those products.[1]

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[1] The seven determinations were the following:

1. *Carbon Steel Structural Shapes from Brazil,* Inv. No. 701-TA-118 (Preliminary), USITC Pub. No. 1221 (February, 1982), 47 Fed. Reg. 9100 (March 3, 1982)
2. *Hot-Rolled Carbon Steel Bar from Brazil,* Inv. No. 701-TA-126 (Preliminary), USITC Pub. No. 1221 (February, 1982), 47 Fed. Reg. 9101 (March 3, 1982)
3. *Cold-Formed Carbon Steel Bar from Brazil,* Inv. No. 701-TA-135 (Preliminary), USITC Pub. No. 1221 (February, 1982), 47 Fed. Reg. 9104 (March 3, 1982)
4. *Hot-Rolled Carbon Steel from Spain,* Inv. No. 701-TA-156 (Preliminary), USITC Pub. No. 1255 (June, 1982), 47 Fed. Reg. 26040 (June 16, 1982)
5. *Hot-Rolled Alloy Steel Bar from Spain,* Inv. No. 701-TA-161 (Preliminary), USITC Pub. No. 1255 (June, 1982), 47 Fed. Reg. 26043 (June 16, 1982)

Continued

The ITC made these preliminary determinations in February and June of 1982 pursuant to section 703(a) of the Trade Agreements Act of 1979 (the Act) (19 U.S.C. § 1671b(a)).[2]

These seven determinations affected seven kinds of steel products, coming from three countries, Brazil, Spain and Korea.[3]

It is important to add that in February of 1982, the ITC had found that, in the case of five of these products, imported from other countries, there was a reasonable indication of material injury.[4]

In support of its determinations that there were no reasonable indications of material injury or threats of injury in the seven cases under review here, the ITC relied on one or more of the following reasons:

(a) Low volume of importations.
(b) Declining volume of importations.
(c) Low penetration (low percentage of domestic consumption).
(d) Declining penetration.
(e) No evidence of underselling.
(f) No evidence of price suppression or depression.
(g) No confirmed lost sales.
(h) Healthy condition or relatively healthy condition of the domestic industry.

In this review the Court finds that the ITC erred in three respects.

First, with respect to those five products whose importations could possibly contribute to material injury by adding to the effects of importations of those products from *other* countries, the ITC erred by considering each of those products separately from each country. This error affected the preliminary determinations listed in footnote 1, except for Nos. 5 and 6. For those five products the

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6. *Cold-Formed Alloy Steel Bar from Spain*, Inv. No. 701-TA-163 (Preliminary), USITC Pub. No. 1255 (June, 1982), 47 Fed. Reg. 26045 (June 16, 1982)

7. *Cold-Rolled Carbon Steel from Korea*, Inv. No. 701-TA-172 (Preliminary), USITC Pub. No. 1261 (June, 1982), 47 Fed. Reg. 28481 (June 30, 1982)

[2] § 1671b. Preliminary determinations

(a) Determination by Commission of reasonable indication of injury.

Except in the case of a petition dismissed by the administering authority under section 702(c)(3) [19 U.S.C. § 1671a(c)(3)], the Commission, within 45 days after the date on which a petition is filed under section 702(b) [19 U.S.C. § 1671a(b)] or on which it receives notice from the administering authority of an investigation commenced under section 702(a) [19 U.S.C. § 1671a(a)], shall make a determination, based upon the best information available to it at the time of the determination, of whether there is a reasonable indication that—

(1) an industry in the United States—
(A) is materially injured, or
(B) is threatened with material injury, or
(2) the establishment of an industry in the United States is materially retarded,

by reason of imports of the merchandise which is the subject of the investigation by the administering authority. If that determination is negative, the investigation shall be terminated.

[3] The Brazilian and Spanish products were among those included in petitions filed in January of 1982. The challenged determinations of "no reasonable indication of injury" were made in February, 1982 for the Brazilian products. For the Spanish products, the determinations were made in June, 1982 because the Spanish investigations moved to a later schedule when Spain became a "country under the Agreement," and therefore became entitled to an injury determination. The determination as to the Korean product was made in June, 1982 from petitions filed in May, 1982.

[4] Those five steel products were hot-rolled sheet, cold-rolled sheet, carbon steel structurals, hot-rolled carbon bars and cold-formed carbon bars. The countries from which importations were found to be presenting a reasonable indication of injury were the Federal Republic of Germany and France (hot and cold-rolled sheet and structurals); Italy (hot and cold-rolled sheet); Belgium (hot-rolled sheet and structurals); the Netherlands (hot and cold-rolled sheet); Luxembourg (structurals) and the Untied Kingdom (hot-rolled and cold-formed carbon bars).

criterion for finding a reasonable indication of material injury should have been simply whether all subsidized or allegedly subsidized products of the same type could exert a combined effect on the domestic industry. The ITC should have considered only the cumulated sum of importations of a particular product. In these preliminary determinations, the factors listed above could be relevant only for the cumulated amount as a whole.[5] For importations from a single country that were irrelevant.

Second, with respect to products which were not initially subject to the necessity of cumulated consideration, the ITC erred by applying too stringent a standard to the information before it and by weighing conflicting evidence concerning the listed factors. This error affected the preliminary determinations numbered 5 and 6 in footnote 1. For those products, the presence of any information from which the possibility of material injury could be reasonably inferred, was sufficient to present a reasonable indication of injury.

Third, with respect to the possibility of the existence of threats of material injury, the ITC also applied too stringent a standard and did not direct its preliminary inquiries to the proper factors.

These three errors will be discissed separately.

I

On the subject of cumulation the parties have presented a three-sided argument. In essence, plaintiffs argue that the cumulation of importations of a product from different countries is mandatory and permanent. The intervenors argue that it is unlawful. The ITC argues that it is discretionary.

Plaintiffs claim that for the purposes of a countervailing duty investigation all contemporary, subsidized or allegedly subsidized, competitive importations of a product, must be cumulated and considered as a unit for purposes of determining whether the domestic industry is being materially injured.

Plaintiffs urge that had the ITC done so, it would have been obvious that, given an indication of injury from one or more of those other sources, the allegedly subsidized imports involved here, in any amount, must be added to the same finding. Plaintiffs further argue that if importations from any of those other sources were finally found to be the cause of material injury, any other contemporary importations must *also* be subject to the same finding.

The defendant intervenors, representing Brazilian producers and Korean producers, argue that cumulation, as envisioned by plaintiffs, is not required by the countervailing duty law and would, in fact, violate the law and the international agreements that the law was intended to implement. They assert that this violation would occur if the ITC was to find injury from a country's products without proof of causation.

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[5] A special problem involving factor (h) is discussed *infra* in Part II of the opinion.

The ITC argues that it properly exercized its discretion to consider the effect of importations of these products individually, as importations from separate countries. It further contends that, in each determination, its evaluation of the information gave a rational and lawful basis to the determinations that there were no reasonable indications of injury from importations of these products.

More specifically, on the issue of cumulation, the ITC maintained that these importations "could not conceivably have contributed to material injury." 47 Fed. Reg. at 9091. It further stated that "the factors and conditions of trade" must show the relevance of cumulation to the determination of injury. These factors were stated to include the following:

—volume of subject imports
—trend of import volume
—fungibility of imports
—competition in markets for the same end users
—common channels of distribution
—pricing similarity
—simultaneous impact
—any coordinated action by importers [6]

In this judicial review the Court finds that the contributing effect standard is incorrect for the preliminary determination of whether there is a reasonable indication of material injury from importations originating from more than one country. The Court finds that when there is alleged to be material injury caused by importations from more than one country, the contributing effect standard is proper only for a *final* determination of injury, and then only in a manner which is consistent with the use of cumulation in the first instance.

The Court's conclusions are based on the purposes of the countervailing duty law, the standard established in the statute for the ITC's preliminary determination, the legislative history pertaining thereto, the necessity for internal consistency in the law, and the harmonization of the law with the international agreement it was intended to implement.

Cumulation is essential to the investigation of injury, and by extension, essential to the enforcement of the countervailing duty law, in two important situations. The first occurs when a number of subsidized sources, no one of which could injure the domestic industry by itself, combine to do injury to the industry. The second occurs when a subsidized source, again not sufficient individually to cause injury to the industry, adds to the injury caused by larger sources. If the countervailing duty law is not administered to take combined or exacerbating effects into account, then it is not being

[6] See also, *Certain Steel Products from Spain*, Inv. Nos. 701-TA-155-163 (Preliminary) USITC Pub. No. 1255, at 8 and n. 15; *Certain Steel Products from the Republic of Korea*, Inv. Nos. 701-TA-170-173 (Preliminary) USITC Pub. No. 1261 (1982) at 5 and n. 13.

administered reasonably and its fundamental purpose is not being effectuated.

The ITC has not proposed to apply its "contribution" standard for cumulation to cases in which importations are originating from more than one producer in a *single* country. These producers are treated as a unit. It is inconsistent for the ITC to treat importations coming from more than one country in a different manner. For the purposes of determining the *possibility* of material injury, distinctions based on the particular sources of importations are immaterial.

For the making of a determination as to whether there is a reasonable indication of injury from a number of different sources, the contributing effect standard for each separate source is too stringent. Cumulation has to be done without any evidence of the specific causal effect of a segment of importations from a particular country. In the beginning of the ITC's role in these proceedings, it is only the entire mass which must display some possibility of injury, not the individual components of the mass. It must be understood that when the Court speaks of a multiplicity of sources having a combined effect, the "contribution" of a particular source of importations is what is required to make it a cause of material injury *in the final sense.* The maximum ultimate effect of a segment of subsidized importations from one of many countries is its contribution to an injury (if the combined results affect the "industry"). For this reason, it follows that if the ITC asks that a particular segment from one country be shown to contribute to injury *as a condition* to being considered or cumulated with others, i.e., as a condition for being investigated, it is asking for a *final* showing of injury, not an *indication* of injury.

Moreover, cumulation, aside from operating in the absence of direct proof of causation, cannot depend on the *volume* or *trend of volume* of a particular segment of importations. The concept of cumulation is specifically needed for instances when the individual segment may only have sufficient size to adversely affect a single member of the industry. The trend of volume has no bearing on the possibility of such an effect. This effect alone may not be sufficient to support a finding of injury to an industry, but it *will* be sufficient to support a final finding of injury which includes that segment if, taken together with other effects, "industry-wide" injury is caused or exacerbated. It follows that if the ITC uses volume or trend as a condition for investigation, it is ignoring the possibility that, even the smallest volumes or declining trends can have a *contributing* effect in the final analysis, after the matter has been properly investigated. For this reason, when cumulation is appropriate there can be no application of the rule of *de minimus,* and no negative inferences from volume or trend.

The Court holds that the proper test for cumulation is whether subsidized or allegedly subsidized imported products are competing

with the product of a domestic industry during a period when the effect of these importations is being felt by the domestic industry. This standard is the only reasonable means of insuring that there is an investigation of the possibility that segments of subsidized importations may be contributing to, or exacerbating, an injury to a domestic industry.

Up to this point, the Court has stressed the necessity of cumulation and has identified the criterion of competitiveness as the standard for cumulation. The next question is whether cumulation can lead to a final injury determination for importations from a given country, without the necessity of a finding that importations from that country were a specific cause of injury.

On this issue the Court holds that cumulation, as important as it is to the *investigation* of injury, cannot, in the end, completely eliminate the need for a causal connection between importations from a country and injury to a domestic industry. The controlling legal consideration is that an injury determination was added to our countervailing duty law to implement the Subsidies Code, an international agreement.[7] The injury determination is something which individual countries, the United States among them, have agreed to make a condition of the assessment of countervailing duties on each other. Common principles of fairness dictate that the final injury determination must be based on some factual connection between the imports from a specific country and an aspect of the injury to the domestic industry.

The material injury test for products of other countries was referred to by the Senate Committee on Finance as "the most conspicuous change in current law required by the agreements. * * *"[8] It must be given the fullest possible meaning consistent with its importance in the international agreement and the constraints of our law.

Our law does not go so far as to require that the *subsidy itself* be shown to be the cause of injury, but it does honor the Subsidies Code to the extent that the injury must be connected to importa-

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[7] A few of the relevant provisions, with footnotes omitted, read as follows:

Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade

(as reprinted in the Message from the President of the United States, Transmitting THE TEXTS OF THE TRADE AGREEMENTS NEGOTIATED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, PURSUANT TO SECTION 102 OF THE TRADE ACT OF 1974)

Part I

Article 1—Application of Article VI of the General Agreement

Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement.

* * * * * * *

Article 6—Determination of injury

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4. It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of this Agreement. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the subsidized imports.

[8] S. Rep. No. 96-249, 96th Cong., 1st Sess. (1979) 38.

tions from a country, which importations have benefited from a subsidy.[9]

For the ultimate enforcement of such a law, the Court distinguishes between evidence such as the behavior of supply and demand curves and the theoretical effect of increases in supply on prices (which may be sufficient to show a reasonable indication of injury), and evidence of specific actions and reactions occurring in the marketplace. The law is written to place final reliance on the detection of verifiable events. This is the focus of the detailed elements which must be considered by the ITC under 19 U.S.C. § 1677(7) in making an injury determination. Reliance on concrete evidence and verifiable events benefits all parties. It prevents preordained, formulated results of all types.

At this point the Court has expressed the necessity of cumulation and the necessity of a finding of causation. These potentially contradictory demands are reconciled by operating at different stages of the investigation.

Cumulation operates on its own terms at the preliminary determination to require the consideration of the combined effect of all competitive, subsidized or allegedly subsidized importations of a particular product. It operates at the final determination only in conjunction with findings of contribution to injury from the products of particular countries. This vital distinction is grounded in the statutory language, and in the extensive legislative history, both of which indicate an extremely low threshold for finding a reasonable indication of injury.

The "reasonable indication" determination is the second of five stages of decision in the normal investigation. It is preceded by the review of the sufficiency of the petition which is conducted by the International Trade Administration of the Department of Commerce (ITA) under § 702(c) of the Act (19 U.S.C. § 1671a(c)). It is followed (if the ITC finds a reasonable indication of injury) by the preliminary and final subsidy determinations of the ITA and then, (if the final subsidy determination is affirmative) by the ITC's final injury determination.

In the opinion of the Court, this first determination by the ITC is part of a two-step decision on whether a full-fledged investigation should take place. In functional terms it stands as part of the low threshold to the later investigation of subsidy and injury. It is not a miniature investigation of injury. This standard resembles the low threshold of the ITA decision on the sufficiency of the petition.

To begin with, the language used in the statute to describe the threshold requirement is extremely flexible. It calls only for a "reasonable indication." The word "indication" suggests only the barest clues or signs needed to justify further inquiry. The use of the "reasonable" standard suggests that, in the case of a multiplicity of al-

[9] On this point it must be noted that Congress did not give a complete implementation to the International Antidumping Code. See, S. Rep. No. 96-249, 96th Cong. 1st Sess. (1979) 40.

legedly injurious importations, it is too much to expect firm proof with respect to all.

In connection with the standard for this determination the House Committee on Ways and Means stated that a reasonably indication will exist in "each case in which the facts reasonably indicate that an industry in the United States could *possibly* be suffering material injury. * * *" [emphasis supplied] House Rep. No. 96–317, 96th Cong. 1st Sess., 52.

In more extensive remarks, the Senate Committee on Finance noted that this determination by the ITC, together with the sufficiency determination of the ITA, implemented Article 2(4) of the Agreement On Interpretation And Application Of Articles VI, XVI And XXIII of the General Agreement on Tariffs and Trade.

> Before a countervailing duty investigation is initiated, Article 2(4) of the Agreement requires consideration whether both a subsidy and injury exist. The petition determination by the authority under section 702(c) and the determination by the ITC under section 703(a) will implement that requirement for the United States. S. Rep. No. 96–249, 96th Cong. 1st Sess. 49.

The importance of this legislative history is that it indicates that the ITC decision is primarily *part of the decision as to whether an investigation should be initiated.* It is not intended to have the substantive content of the full investigation itself. The implication of this legislative history is that the ITC preliminary determination stands in relatively the same position in the statutory scheme as the ITA sufficiency determination. It should display the same spirit of receptiveness to the initiation of investigations as the ITA sufficiency determination.

Another indication of the law's encouragement of investigations is the statement by the Senate Finance Committee that it "intends the 'reasonable indication' standard to be applied in essentially the same manner as the 'reasonable indication' standard under section 201(c)(2) of the Antidumping Act, 1921 has been applied." S. Rep. No. 96–249 at 49.

That standard was introduced into the antidumping proceedings by the Trade Reform Act of 1974 and was intended merely to weed out those cases which were clearly without merit and which could not possibly deserve further investigation. This limited purpose was amplified in the legislative history of the Trade Reform Act.[10]

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[10] The relevant portion of the legislative history reads as follows:

Under the present Act, the Secretary of the Treasury must complete his entire investigation as to sales at less than fair value before the matter can be referred to the International Trade Commission for its injury determination. The Committee felt that there ought to be a procedure for terminating investigations at an earlier stage where there was no reasonable indication that injury or the likelihood of injury could be found. Therefore, the Committee adopted a new provision, section 201(c)(2), which provides for the elimination, at an early stage of the antidumping proceedings, of those cases in which there is no reasonable indication that an industry in the United States is being established, by reason of the importation of the merchandise concerned into the United States. The amendment is designed to eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade. Under the amendment, if the Secretary, in the course of determining whether to initiate an antidumping investigation, concludes that there is substantial doubt as to whether injury under the Act exists, he will forward to the International Trade Commission the reasons for his doubts and any

Continued

The Court is also somewhat influenced by the fact that in the administrative step which comes *after* an ITC finding of reasonable indication of injury, the *ITA*'s function is to determine "whether there is a reasonable basis to believe or suspect that a subsidy is being provided. * * *." § 703(b) (19 U.S.C. § 1671b(b). The standard of this latter function was characterized by the legislators as "not stringent" and "intended to be lower than the Treasury's standard for preliminary determinations under current practice." S. Rep. No. 96–249, 96th Cong., 1st Sess. 50. In the midst of the receptive standard of the *preceding* determination and the relaxed standard of the *following* determination, it is reasonable to view the first ITC determination as designed only to eliminate those matters in which there is nothing whatsoever deserving investigation.

It must be acknowledged that the same legislative history expects the ITC to conduct a "thorough inquiry" in this preliminary determination. This is tempered however, by recognition that it cannot conduct a full-scale investigation within 45 days and that "the nature of the inquiry may vary from case to case depending on the nature of the information available and the complexity of the issues." At that early stage the thoroughness is for the purpose of deciding whether a possibility of injury exists, not for the purpose of deciding between alternative possibilities.

The Court also notes the statement in the legislative history that the burden of proof is on the petitioner in this phase of the administrative proceeding. In light of all the considerations discussed above, this must mean that petitioner has the burden of providing only what is reasonable to indicate the need for further investigation. In context, this means enough to *raise* the issue of injury, not enough to *resolve* the issue.

Another branch of support for the necessity of cumulation is the fact that a concept of cumulation has been applied in antidumping investigations.[11] In the Court's view this reinforces the necessity of cumulation, preliminarily on the basis of competitiveness, and finally on the basis of contribution to injury. The antidumping law and the countervailing duty law now share the same injury standard. They ought to share the same necessities which arise in the determination of injury, one of which is the cumulation of importations capable of exerting a combined effect on the domestic industry.

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available information and preliminary indications concerning possible sales at less than fair value, including dumping margins and the volume of trade. If the Commission, within 30 days after receipt of such information from the Secretary that there is no reasonable indication that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, no further proceedings would be conducted. Otherwise, any investigation then in progress would be continued. S. Rep. No. 93–1298, 93rd Cong. 2d Sess. 170, 171.

[11] *Pig Iron From East Germany, Czechoslovakia, Romania and the U.S.S.R.*, 33 Fed. Reg. 14664 (1968); *Potassium Chloride From Canada, France, and West Germany*, 34 Fed. Reg. 19003 (Nov. 27, 1969); *Pig Iron From Canada, Finland, and West Germany*, 36 Fed. Reg. 11835 (June 19, 1971); *Large Power Transformers From France, Italy, Japan, Switzerland, and the United Kingdom*, 37 Fed. Reg. 8136 (April 25, 1972); *Primary Lead Metal From Australia and Canada*, 39 Fed. Reg. 2156 (Jan. 17, 1974); *Animal Glue And Inedible Gelatin From Yugoslavia, Sweden, the Netherlands, and West Germany*, 42 Fed. Reg. 57565 (Nov. 3, 1977); *Spun Acrylic Yarn From Japan and Italy*, 45 Fed. Reg. 19682 (March 26, 1980).

Congress had noted the use of cumulation in antidumping investigations and spoke of it in the legislative history of the Trade Reform Act of 1974 as follows:

> A number of cases before the Commission have been concerned with the question of whether imports of comparable articles from different countries should be considered together or cumulated in making injury determinations. The issue arises in several different contexts, *viz*: (1) when Treasury determinations involving comparable imports from two or more different countries are simultaneously submitted to the Commission; (2) when Treasury determinations on comparable imports are submitted to the Commission at different times. Under consistent practice, * * * the Commission has considered the combined impact of less-than-fair-value imports in making injury determinations when the facts and economic considerations so warrant. Such result does not follow as a matter of law; it follows, on a case by case basis, only when the factors and conditions of trade show its relevance to the determination of the injury. S. Rep. 93-1298, 93rd Cong., 2d Sess. 180 (1974)

In this opinion, the Court is recognizing the necessity of cumulation in countervailing duty investigations. The Court is further clarifying the standards which must govern the use of cumulation in preliminary and final determinations. In doing this the Court notes that cumulation is not done automatically as a matter of law. It continues to be a question involving the factors and conditions of trade. But these factors, when it comes to finding a reasonable indication of injury, are only those factors which relate to the competitive nature of the products which are the subject of a petition. Factors of actual causation are properly the subject of a full investigation and enter the equation only if a final determination is needed.

In sum, the Court has found cumulation to be necessary for the *meaningful* enforcement of the law and causation to be necessary for the *fair* enforcement of the law. The cumulation of importations from different countries for the purpose of investigation is tempered, in the final stage, by the necessity of finding that products of each country are contributing to material injury.

II

The Court now addresses the remaining two determinations; those in which the issue of cumulation was not the first logical issue.[12] These were the determinations by the ITC that importations of hot-rolled alloy steel bars and cold-formed alloy steel bars from Spain did not present a reasonable indication of injury.[13]

With respect to the hot-rolled alloy bars, the ITC finding was "primarily based" on the "healthy condition" of the domestic industry (USITC Pub. 1255, p. 26) and additionally, on the decline in

[12] These are the determinations numbered 5 and 6 in footnote 1.

[13] At the time the Spanish alloy bar determinations were made there were no prior determinations indicating injury from importations of alloy bar from other countries.

imports. The finding as to the cold-formed alloy bars, was based on the "relatively healthy condition" of the industry and 'no reasonable indication of a causal relationship" between the decline of the industry's economic indicators and the small volume of Spanish imports.

These determinations were not made in accordance with law, because the ITC should not be engaged in a determination of whether an industry is "healthy." A "healthy" industry can be experiencing injury from importations and an "unhealthy" industry can be unaffected by importations. The purpose of the ITC's investigation is to determine whether imports are a cause of any effect on an industry which could amount to "material injury." This is the clear meaning of the detailed statutory instructions on the weighing of injury contained in 19 U.S.C. § 1677(7).

The ITC focused on a concept of health which is not meaningful, other than as alternative language for the conclusion that importations could not possibly cause material injury. Even if the Spanish alloy bar determinations are read as properly focused determinations that there was no reasonable indication of injury, they are not in accordance with the law. They were made by weighing conflicting data, not by looking for whether there was a reasonable indication of injury.

In the case of hot-rolled alloy bars, the economic indicators of the domestic industry showed an improvement in 1981, but this was a decline from the three preceding years; and the improvement was not carried on into the first quarter of 1982, when the over-all decline resumed. The volume of imports showed 11,000 tons in 1978; less than 500 tons in 1979; 1,000 tons in 1980; 5,000 tons in 1981 (1,000 in the first quarter); and 4,000 tons in the *first* quarter of 1982. The import penetration level was four-tenths of a percent in 1978, less than five-hundreths of a percent in 1979 and 1980, two-tenths of a percent in 1981 (one-tenth of a percent in the first quarter) and seven-tenths of a percent in the first quarter of 1982.

The court recites these figures, not to engage in an evaluation on economic data, but merely to demonstrate that this data could support different conclusions. If the ITC had not weighed conflicting evidence, there would be some factors to provide probable cause to investigate further. If reasonable arguments can be made concerning the ITC's weighing of conflicting data then *there must have been sufficient information to pass the low threshold of a reasonable indication of injury.*

The low threshold of the ITC's determination of whether there is a reasonable indication of injury is the unavoidable and logical consequence of the completely different nature of the two stages of the ITC's involvement in these proceedings. *The object of these determinations should have been simply to find whether there were any facts which raised the possibility of injury. The resolution or inter-*

pretation of conflicting facts should have been reserved for a possible final injury determination.

The fundamental point which the Court emphasizes is that the standard claimed by the ITC for its preliminary determination of reasonable indication of injury, is actually the proper standard for a final determination. If applied at this early stage it would create a serious imbalance in the operation of the law.

It is true that under 19 U.S.C. § 1677(7) the ITC is required to consider a variety of factors in both its preliminary and final determinations. But this does not mean that these factors are to be examined in the same way in both stages. In fact, they must be examined differently, *because they are being examined for different purposes.*

In the first determination, they are being examined to see if there are any elements at all which raise the possibility of injury—not whether a balancing or weighing of conflicting elements supports that conclusion. In the final determination the ITC is exercising the full measure of its expertise and discretion to weigh and evaluate conflicting evidence.

This crucial distinction must be maintained in order for the law to operate fairly and effectively.

III

Threat of material injury is a separate matter from material injury itself. In these cases the ITC also found that there was no reasonable indication of a *threat* of material injury. This determination is challenged by plaintiffs as being the result of a failure to consider the appropriate information or to conduct its inquiry for information in the proper manner.

For the most part, (with the exception of the Korean matter), these determinations appear to have relied on data regarding import volume and trend. This was the same data which led to the determinations that there was no reasonable indication of actual material injury.

This information is not the logical focus of an investigation into threat of injury. The essence of a threat lies in the ability and incentive to act imminently. This can be investigated by objective measurements of production capacity, available inventory, export markets and recognizable factors of economic motivation. Most of this information is normally within the knowledge of the producers and it is unfair to penalize the petitioners for the absence of this information, particularly if it has been requested of foreign respondents and has not been supplied.

In addition, the nature of the subsidy plays an important role, with an obviously significant incentive arising if the subsidy happens to be an *export* subsidy. "Information" as to the nature of the subsidy must be considered by the ITC under the compulsion of 19

U.S.C. § 1677(7)(E).[14] The ITC's argument that it has no such "information" at the preliminary stage is disingenuous. At that early stage, it has to work iwith the subsidy allegations of the petition as an element in the search for the possibility of a threat.

In short, the Court is persuaded that just as the meaningfulness of the law depends on a low threshold for a reasonable indication of an actual material injury, it depends on a low threshold for a reasonable indication of threat of injury. Moreover, because the evidence needed to support the indication of threat is more difficult to obtain than evidence of actual injury, it is reasonable to predicate the need for further investigation of a threat on the barest indications.

In the case of Korea, the factor of capacity *was* examined, and the bankruptcy of one producer was noted. But the conclusion was the result of weighing conflicting evidence, not a finding of the complete absence of the possibility of threat. Thus, the factors of alleged export subsidies, the possible excess capacity of other producers, and the expression of export intentions recorded by ITC investigators were not considered.

In these respects, the ITC's determinations that there were no reasonable indications of threats of material injury in these matters were not in accordance with the law.

IV

The conclusions reached by the Court require that these determinations be remanded to the ITC on the following terms:

The five determinations numbered 1, 2, 3, 4 and 7 in footnote 1 should have been made by cumulating the involved product with the same product, since found to be presenting a reasonable indication of injury. They are remanded for the ITC to make and publish a determination of reasonable indication of injury.

The two determinations regarding alloy bar from Spain numbered 5 and 6 in footnote 1, are remanded for the making of a new determination of whether there is a reasonable indication of injury, consistent with the standard enunciated in this opinion. The Court notes that for the determination in those two cases, it will *not* order that they be considered cumulatively with earlier alloy bar importations from other countries which the ITC found *not* to be presenting a reasonable indication of injury.[15]

For all the products involved here the Court will require the ITC to make a preliminary determination of whether there is a reason-

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[14] 19 U.S.C. § 1677(7)(E) reads as follows:

In determining whether there is a threat of material injury, the Commission shall consider such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement) provided by a foreign country. * * *

[15] The earlier negative determinations were preliminary determinations regarding hot-rolled alloy bar from France, Italy, United Kingdom and West Germany and cold-formed alloy steel bar from Belgium, France, Italy, United Kingdom and West Germany. 47 Fed. Reg. 9103 and 47 Fed. Reg. 9105.

able indication of a threat of material injury, consistent with this opinion.

The ITC shall have 45 days from the date of this opinion to comply with these instructions.

Dated: July 11, 1984, New York, New York.

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The following abstracts of decisions of the United
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decisions are not of sufficient general interest to print
to Customs officials in easily locating cases and tracing

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Protest Decisions

DEPARTMENT OF THE TREASURY, *July 11, 1984.*

ited States Court of International Trade at New York are
ficers of the Customs and others concerned. Although the
rint in full, the summary herein given will be of assistance
cing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and Ra
P84/219	Re, C.J. July 10, 1984	Disston, A Div. of Sandvik	83-6-00819	Item 688.45 4.9%
P84/220	Re, C.J. July 10, 1984	Jimlar Corp.	78-9-01565	Merchandise marked "A" classified unde item 700.60 20%; Item 700.70 (soles of material other than leather a uppers of vegetable fiber which are not subject to appraisement under America selling price)
P84/221	Watson, J. July 10, 1984	Gold Rose Inc. et ano.	80-3-00492	Item 807.00 Various rates for items 382.1 382.12, 382.63, 382.81

SSED and Rate	HELD Item No. and Rate	BASIS	PORT OF ENTRY AND MERCHANDISE
45	Item A685.70 Free of duty pursuant to GSP	A & A International Inc. v. U.S. 5 CIT — Slip Op. 83-42, (1983)	Norfolk Bells, sirens, burglar and fire alarms, etc.
lise "A" d under 0.60 em soles of l other ather and of le fibers, re not to ement American price)	Item 700.70 7.5%	Agreed statement of facts	Boston Footwear
00 rates s 382.11, 382.63,	Item 807.00 Allowance for fabric components which were the product of the U.S.A. and which were utilized in assembling the imported merchandise	United States v. Mast Industries Inc. 69 CCPA 47; C.A. 81-18, 668 F.2d 501 (1981)	Miami Shirts and pants

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS VALUA
R84/286	Watson, J. July 6, 1984	Arrow Trading Co.	R67/16490, etc.	Export valu
R84/287	Watson, J. July 6, 1984	Fortune Star Products Co.	R68/9917	Export valu
R84/288	Watson, J. July 6, 1984	Jay Dee Imports Inc.	R68/5353, etc.	Export valu

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BASIS OF ALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
rt value	Appraised unit values plus 20% of the difference between the f.o.b. unit prices and the appraised values	Agreed statement of facts	New York Radios
rt value	Appraised unit values plus 20% of the difference between the f.o.b. unit prices and the appraised values	Agreed statement of facts	New York Radios
rt value	F.o.b. unit invoice prices plus 20% of the difference between the f.o.b. unit invoice prices and the appraised values	Agreed statement of facts	New York Batteries

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
R84/289	Watson, J. July 6, 1984	Lian Bros. Inc.	R61/3714	Export value
R84/290	Watson, J. July 6, 1984	E. Mishan & Sons	R64/21977	Export value
R84/291	Watson, J. July 6, 1984	Arrow Trading Co.	R67/20720, etc.	Export value

IS OF ATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
lue	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Tablecloths and binoculars
lue	Appraised unit values plus 20% of the difference between the f.o.b. unit prices and the appraised values	Agreed statement of facts	New York Radios and batteries
lue	F.o.b. unit invoice prices plus 20% of the difference between the f.o.b. unit invoice prices and the appraised values	Agreed statement of facts	New York Batteries, fittings, bedspreads

Appeals to U.S. Court of Appeals for the Federal Circuit

APPEAL No. 84-1298—Vivitar Corp. v. The United States—GREY MARKET GOODS/IMPORT RESTRICTIONS—Appeal from Slip Op. 84-36, filed June 4, 1984.

APPEAL No. 84-1326—Toyota Motor Sales U.S.A. Inc. v. The United States—AUTOMOTIVE CAB CHASSIS—Appeal from Slip Op. 84-38, filed June 11, 1984.

APPEAL No. 84-1413—Atlantic Richfield Co. v. The United States—CHEMICALS—TSUS—CLASSIFICATION—Appeal from Slip Op. 84-54, filed June 26, 1984.

APPEAL No. 84-1414—Grover Piston Ring, Inc. v. The United States—CLASSIFICATION—Parts of Lineal Hydraulic Motors—Hydraulic Cylinders—Appeal from Slip Op. 84-56, filed June 27, 1984.

Decision of U.S. Court of Appeals for the Federal Circuit

APPEAL No. 84-651—Julian R. Woodrum, et al. v. The United States—TRADE ADJUSTMENT ACT—Appeal from Slip Op. 83-43, 5 Ct. Int'l Trade —, 564 F. Supp. 826 (1983)—Affirmed July 3, 1984.

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